(1887) 09 AHC CK 0001

Allahabad High Court

Case No: None

Queen-Empress		APPELLANT
	Vs	
Wazir Jan		RESPONDENT

Date of Decision: Sept. 15, 1887

Citation: (1888) ILR (All) 58

Hon'ble Judges: Mahmood, J

Bench: Single Bench

Final Decision: Disposed Of

Judgement

Mahmood, J.

The facts found by both the lower Courts on the evidence before them are sufficient to substantiate the offence of personating a public servant within the meaning of Section 170 of the Indian Penal Code, and also the offence of extortion punishable u/s 384 of that Code, and in respect of these findings I see no reason to differ with the Courts below. But Mr. Gordon, in supporting the petition, argues that the charge originally referred only to Section 170 of the Indian Penal Code, and that the charge u/s 384 was added so-late that it has prejudiced the petitioner. I cannot accept this contention, because the terms of Section 227 of the Criminal Procedure Code, read even with the two following sections, are sufficiently wide to permit the Magistrate to amend the charge in the manner in which it was amended in this case. In this case the facts and the evidence on, which the conviction proceeded would not vary by reason of such alteration or addition, and there was, therefore, no prejudice to the petitioner by reason of the charge having been amended. I might almost go further and say that even if there had been an irregularity, under the circumstances of this case, I should have regarded it as one covered by Section 537 of the Criminal Procedure Code.

2. I agree with the learned Sessions Judge in the view that the evidence was sufficient to convict the petitioner under both Section 170 and Section 384 of the Indian Penal Code. But the learned Judge in convicting the prisoner under both

Section has passed a sentence of nine months rigorous imprisonment only u/s 384 of the Indian Penal Code, and he goes on to observe "that it is unnecessary to record any sentence in respect of the conviction u/s 170 of the said Code." The Court of First Instance, that is, the Magistrate, had sentenced the accused to nine months'' rigorous imprisonment for each of the two offences and directed the sentences to "run concurrently."

3. This state of things raises the following three questions of law which it is necessary for me to decide:

(1) Whether the Magistrate was right in convicting the accused both u/s 170 and Section 384 of the Indian Penal Code.

(2) Whether the Magistrate was right in passing separate sentences with the direction that they were to "run concurrently."

(3) Whether the learned Sessions Judge was right in declining to pass any sentence in respect of the conviction u/s 170 of the Penal Code.

4. None of these questions is altogether free from difficulty, specially as the case-law upon these and other cognate questions does not seem to have put the matter at rest, and the decision of them requires consideration both of the substantive and the adjective rules of the criminal law, that is, of the provisions of the Indian Penal Code and of the Code of Criminal Procedure.

5. Viewed in this light, the first point as enunciated by me is a question of the rules of criminal procedure which must of course be considered with due regard to the behests of the substantive criminal law, that is, the Indian Penal Cede. Now there is nothing either in Section 170 or in Section 384 of that Code which can be understood to lay down the rule that a person guilty of one offence may not at the same time be guilty of the other, and both Section by using the word "shall" indicate the imperative mandate of the Legislature that persons guilty of those offences are to be punished, a direction of the law which is in keeping with the general principles of jurisprudence. There is, indeed, another section of the same Code which has a bearing upon such matters, and that section is Section 71, which governs the whole Code and regulates the limit of punishment in case in which the greater offence is made up of two or more minor offences. The section, however, is not a rule of adjective law or procedure, but a rule of substantive law regulating the measure of punishment, and it cannot, therefore, affect the question of conviction, which relates to the province of procedure.

6. The Code of Criminal Procedure, therefore, is the law which must be referred to. Section 35 of that Code distinctly provides that separate sentences may be passed in cases of conviction for several offences at one trial, and the provisions of Section 235 of that Code are in keeping with the earlier section; and illustration (g) of the latter section shows that in one and the same trial there may be separate

convictions for separate offences, though such convictions may arise from facts of the same transaction and proceed upon the same evidence. Indeed, para. Ill of Section 235 of the Criminal Procedure Code distinctly contem-plates the trial of the accused for separate offences where the acts complained of, when combined, would constitute a different offence.

7. These provisions leave no doubt in my mind that in a case such as this the Magistrate was right in trying the accused both u/s 170 and Section 384 of the Indian Penal Code, and in convicting the accused for both offences. The question as to the measure of punishment is a different matter from the question of conviction and rests upon other considerations both of law and fact. There is, however, a note in Mr. Justice PRINSEP''S commentary on the Code of Criminal Procedure Coda (8th ed., p. 33), u/s 35, which states that the Calcutta High Court, has held that when there are in an indictment, two separate offences supported by distinct and separate evidence, a separate sentence should be passed for each offence, the punishment under the second sentence to take effect on the expiry of the first, and that if, however, there are two or more offences supported by the same evidence, or very nearly so, a verdict of guilty should be entered on the offence covered by the greater portion of the evidence as the gravest in the eye of the law, and a verdict of not guilty on the other charges. The case in which this rule was laid down does not appear in the published reports, and the reasons on which the ruling proceeded are not, therefore, available to me. But I confess, with due respect, that I am unable to accept the rule so laid down. I have already said that the question of conviction is distinguishable from the question relating to the measure of punishment, that is, the sentence to be passed. The latter may, indeed, be affected by Section 71 of the Indian Penal Code, or by Section 35 of the Code of Criminal Procedure: in the former case by a rule of substantive law, in the latter by a rule of adjective law. But I am unable to see how the mere circumstance that a series of acts which constitute a minor as also a graver offence, when proved against an accused person who has been charged with and tried for both the offences, can result in a finding of "not guilty" of the minor offences any more than of the graver offence. So far as I am aware, there is nothing in the Code of Criminal Procedure to justify such a course, and Section 71 of the Indian Penal Code cannot be understood to regulate convictions, though of course it governs the question of sentence as a matter of substantive criminal law. The view expressed by the Madras High Court, in their proceedings of the 4th July 1867 (Weir, p. 43), is that when a prisoner is tried on several heads of charge, the most convenient course, with reference to appeals, is to enter up findings on all the counts, though when the several heads of charge are all founded on one continuous transaction, punishment can only be awarded on one. It seems to me that where certain acts constitute more than one offence, whether such offences do or do not fall under the purview of Section 71 of the Indian Penal Code, and the accused is charged and tried for more than one offence and the evidence establishes those offences, the Court is bound to convict him of those

offences, though in awarding punishment the provisions of Section 71 of the Indian Penal Code and of Section 35 of the Code of Criminal Procedure would of course have to be duly kept in view. I have already said that the question of conviction is a question of adjective law or procedure, and that when an offence provided for by the substantive law is proved, a conviction must follow in the absence of express provisions to the contrary in the law of procedure itself. I am not aware of any such provision in our Code of Criminal Procedure, and the nearest approximation to such a rule are the provisions of Section 240 of that Code, which lay down that when more charges than one are made against the same person and a conviction has been had on one or more of them, the prosecution may, with the consent of the Court, withdraw the remaining charge or charges, or the Court may stay their trial. That section, however; does not apply to this case, and I hold that the Magistrate was right, upon the evidence before him, in convicting the accused both u/s 170 and Section 384 of the Indian Penal Code.

8. This leads me to the second question, namely, whether the Magistrate acted rightly in passing what he calls concurrent sentences of nine months'' rigorous imprisonment. I am of opinion that there is no authority in the law to justify such a course. Indeed, the provisions of Section 35 of the Code of Criminal Procedure render such a course illegal. The first paragraph of that section provides that "when a person is convicted, at one trial, of two or more distinct offences, the Court may sentence him, for such offences, to the several punishments prescribed therefore which such Court is competent to inflict: such punishments, when consisting of imprisonment or transportation, to commence the one after the expiration of the other in such order as the Court may direct." In this case the sentences passed by the Magistrate consisted of imprisonment, and such sentences could not, therefore, be made to "run concurrently" as directed by the Magistrate, the phrase "in such order as the Court may direct" not being susceptible of such interpretation as the Magistrate has apparently placed upon it, I hold therefore, that the order of the Magistrate, so far as it directed that the two sentences were to run concurrently, was illegal.

9. I have now to consider the third question, namely, whether the learned Sessions Judge was right in law in declining to pass any sentence in respect of the conviction u/s 170 of the Indian Penal Code. I am of opinion that such an omission was illegal. Just as the maxim ubi jus ibi remedium is a rule of jurisprudence, so it is a principle of the criminal law that where there is an offence there must be a punishment, the general rule being in either case effected by exceptional provisions of the law, whether provided by statute or by some other legal authority, disturbing the uniformity of the application, of general maxims. No such provision or authority is to be found in our criminal law, whether belonging to the domain of substantive law or of adjective law. Indeed, the provisions of Section 170 of the Indian Penal Code itself are imperative, and they leave no room for doubting that whoever commits the offence prescribed by that section must undergo punishment according to the

behests of that section, read, of course, as it must be read, with the general rule contained in Section 71 of that Code. Upon the point, I think the ruling of the Madras High Court, in their proceedings of the 15th January 1869 4 Mad. H. C. Rep., App. XXVII, is applicable in principle. There it was ruled by that Court that when a prisoner is convicted of several offences, a separate sentence should be passed in each case; and though there the trials seem to have been separate, the principle that there should be a separate sentence for each conviction was not disturbed. More to the point is the ruling of a Pull Bench of the Bombay High Court in Reg. v. Anuarkhan 9 Bom. H. C. Rep. 172 where it was held that it is competent to a Magistrate to pass a separate sentence in respect of each of the two charges of house-breaking in order to commit theft, and of theft in a human dwelling, of which & prisoner is found guilty, provided the aggregate punishment awarded on they two charges does not exceed the punishment which the case warrants for the greater of the two offences of which the accused has been convicted, and provided, further, such aggregate punishment does not exceed the jurisdiction of the Court passing the sentence. This also is the effect of the ruling of Turner, J., in Empress v. Budh Singh I. L. R. 2 All. 101 where that learned Judge pointed out that "the law does not prohibit the Court from passing sentence in respect of each offence established, but it declares that the offender must not receive for such offence collectively a punishment more severe than might have been awarded for any one of them, or for the offence formed by their combination." Again, much to the same effect is the ruling of the Bombay Court in Beg. v. Murar Trikam 5 Bom. H. C. Rep. 3 Crown Cases, where it was held that when more than one offence is proved, it is not proper to convict only of one and to acquit of the other, although the offences may be cognate. This view of the law is much the same as that held in Reg. v. Gulam Abbas 12 Bom. H. C. Rep. 147 and again, by the same Court, in a later case, Beg. v. Tukaya bin Tamana I. L. R. 1 Bom. 214 but the view is not altogether consistent with the ruling of the Madras Court in the case of Noujan 7 Mad. H. C. Rep. 375 and of this Court in Queen v. Mungroo N. W. H. C. Rep. 1874 p. 293. The ruling of the Calcutta High Court in Empress v. Jubdur Kazi I. L. R. Cal. 718 appears to throw doubt on the view which I have taken, but that ruling, like the others, refers to the provisions of the old Criminal Procedure Code (Act X of 1872), which have been reproduced in Section 235 of the present Criminal Procedure Code, with the omission of such provisions relating to the measure of punishment as were alien to procedure and properly belonged to the province of substantive law.

10. In Empress v. Ajudhia ILR All. 644 my brother STRAIGHT, dealing with the Criminal Procedure Code of 1872, expressed the view that "where in the course of one and the same transaction an accused person appears to have perpetrated several acts, directed to one end and object, which together amount to a more serious offence than each of them taken individually by itself would constitute, although for purposes of trial it may be convenient to vary the form of charge and to designate not only the principal but the subsidiary crimes alleged to have been

committed, yet, in the interests of simplicity and convenience, it is best to concentrate the conviction and sentence on the graver offence proved." Proceeding upon this view, my learned brother, in dealing with that case, convicted the accused of house-breaking by night in order to commit theft u/s 457 and directed an acquittal upon the charge of theft in a dwelling-house u/s 380 of the Indian Penal Code. This view is no doubt in accord with the ruling of the Madras High Court in ease of Noujan, 7 Mad. H. C. Rep. 375 to which I have already referred, for there it was held that the law forbids "two punishments for an offence so compounded that one substantive offence is the aim of the other and evidentiary matter of the intent necessary to constitute that other." Similar is the principle upon which my brother STRAIGHT''S ruling proceeds in the case of Queen-Empress v. Ram Partab I. L. R. All. 121 where the two offences were those of being a member of an unlawful assembly causing riot, and inflicting grievous hurt. This ruling was, however, dissented from by my brother BRODHURST in Queen-Empress v. Dungar Singh I. L. R.All. 29 and by the learned Chief Justice and my brother BRODHUREST in Queen-Empress v. Bisheshar I. L. R. All. 645 which, so far as I know, is the latest ruling of this Court on the subject.

11. Having considered the various cases to which I have referred, I cannot help thinking, with due respect, that the main reason why such conflict of decision has arisen is confusion between the rules of law regulating the conviction and those which regulate the measure of punishment. An act or a series of acts which in the eye of the substantive criminal law constitute an offence, punishment wherefor is imperatively demanded by the law, must, when duly proved against the accused, result in a conviction; and whenever there is conviction, it follows, as a natural sequence of legal thought, that there must be a punishment, for otherwise the definition of "offence" in Section 40 of the Indian Penal Code would be scarcely intelligible. I am not aware of any rule of our law that an offence when charged and proved against the accused is to result either in a verdict of not guilty or to pass unpunished, whether such an offence is or is not accompanied by another offence, and whether such latter offence does or does not overlap or include the former. I have already said enough to indicate that, in my opinion, Section 71 of the Indian Penal Code has no bearing upon the question of convictions, but relates only to the measure of punishment for offences falling under the purview of that clause. I have also said enough to indicate that, according to my view of the law, neither Section 35 nor Section 235 of the Criminal Procedure Code stands in the way of separate convictions and separate sentences for each offence of which the accused is found guilty in the same trial, though, as a matter of substantive law, Section 71 of the Indian Penal Code affects the measure, or, rather the limit, of punishment, and, as a matter of adjective law, Section 35 of the Criminal Procedure Code has a bearing upon the same question with reference to the powers of the Court awarding the sentence, and with reference to the right of appeal.

12. Applying these views to the present case, I am of opinion that there is no rule of our criminal law which would enable the Court, after finding the accused guilty of an offence, to refrain from passing a sentence on him as punishment for such offence, and therefore the learned Sessions Judge was wrong in law in omitting in this case to pass a sentence upon the accused after having found him guilty u/s 170 of the Indian Penal Code.

13. It now remains for me to consider whether, in the exercise of the revisional powers of this Court, I should disturb the amount of sentence passed upon the accused. The decision of this question again is partly dependent upon considerations of law, though it relates only to the measure of the punishment to, be awarded. The question of law is whether, under the circumstances of this case, the offence of personating a public servant u/s 170 was such as would be included in the offence of extortion as defined in Section 383 and made punishable u/s 384 of the Indian Penal Code. The first paragraph of Section 71 provides that "where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided." This rule is illustrated in the Code itself by illustration (a) to the section, and it is clear that it does not apply to the present case, because the offence of personating a public servant u/s 170 is not any part of the offence of extortion to which Sections 383 and 384 relate. Nor is the second paragraph of Section 71 applicable, because neither of the two offences with which this case is concerned falls under several definitions. The question, then, is whether the case falls under the third part of Section 71--in other words, whether the present case is one "where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence;" because in such cases the section provides that " the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

14. Now I am aware that it has been held in some cases that for the decision of this question the identity of the evidence produced in support of the prosecution is the criterion, but I confess I am unable to adopt this view. Section 71, as I have already said more than once, is a rule of substantive law, and, as such, must be understood to refer to substantive provisions and not to matters of evidence. The phrase "constitute an offence" as it occurs in the section must be understood to refer to the definitions of the offences as enunciated in the Code itself, irrespective of the identity or non-identity of the evidence whereby the several acts are proved. In this view of the law, the offence of personating a public servant u/s 170 cannot be dealt with as a constituent element of the offence of extortion as defined in Section 383 of the Code, even though, as in this case, the evidence shows that but for the former offence the latter offence could not have been successfully committed. In other words, the evidence in this case shows that but for personating a public servant, the accused could not practically have had the means of putting any person in fear of

injury, which is an essential element of extortion; but I hold that this circumstance does not bring the two offences within the purview of the latter part of Section 71 of the Indian Penal Code. The reason for this view is that the offence u/s 170 was complete as soon as the accused falsely pretended to be a public servant as an octroi officer, and in such an assumed character called upon Ram Charan, teli, to show proof of the payment of octroi duty, and threatened him with injury. The offence thus being complete in itself, it could not merge into the offence of extortion u/s 383, of which offence personation as a public servant forms no necessary ingredient. Indeed, the offence of extortion as defined in that section may be practised, and is often practised, by private individuals assuming no pretended authority as public servants, and the mere circumstance that in this ease personating as a public servant was utilized as a means of extorting money will not merge the two offences into one or entitle the accused to escape conviction under both offences. In other words, I hold that it is not to the identity or non-identity of the evidence, nor merely to the individual facts of each case as to the practicability of the offence, but to the definitions of offences as to the elements of the corpus delicti, that we must look for deciding the question as to the applicability of the latter part of Section 71 of the Indian Penal Code for purposes of assessing punishment. And inasmuch as the accused in this case has been found guilty both u/s 170 and Section 384 of the Indian Penal Code, separate sentences should have been awarded, irrespective of the provisions of Section 71 of the Indian Penal Code, but with due regard to the provisions of Section 35 of the Code of Criminal Procedure. The provisions of that section, however, do not affect this case, as the Magistrate who tried the accused was a Magistrate of the first class, and, as such, empowered to pass the sentences which he did.

15. For these reasons I uphold both the convictions of the accused, that is, his convictions under Sections 170 and Section 384 of the Indian Penal Code, and setting aside so much of the order of the learned Sessions Judge as omits to pass a sentence u/s 170 of the Indian Penal Code, I direct that the record be so amended as to sentence the accused to three months'' rigorous imprisonment on the conviction u/s 170 of the Indian Penal Code, and to six months'' rigorous imprisonment on the conviction u/s 384 of the Indian Penal Code, the latter sentence to commence after the expiration of the former. And I may add that I have so apportioned the punishment, because the former offence, though the original one, was subsidiary to the latter offence, and although but for the former offence the latter might on the facts of this case have been impracticable, the latter is the graver offence in the eye of the law.

16. The effect of this amendment of the record does not alter the extent of punishment awarded in this case, as I do not think that the two offences when combined in this manner require a severer punishment. And I have dwelt upon the questions of law at such length because if the two offences of which the accused has been convicted required severer sentences than the aggregate amount of nine

months'' rigorous imprisonment, I should have felt it my duty, in the exercise of the revisional powers of this Court, to award such punishment on each of the two convictions as would in the aggregate exceed the limit of nino months'' rigorous imprisonment.

17. I wish to add that what I have said as to separate convictions requiring separate sentences must not be understood to lay down any rule, as to cases in which the accused is charged with, tried for, and convicted of only one offence, and the facts proved might, if taken piecemeal, constitute minor offences forming ingredients of the graver offence of which the accused has been found guilty. In such cases only one sentence would, of course, be all that is required by the law.