(1947) 09 AHC CK 0013

Allahabad High Court

Case No: None

Sheo Ram and Others		APPELLANT
	Vs	
Emperor		RESPONDENT

Date of Decision: Sept. 3, 1947

Citation: AIR 1948 All 162

Hon'ble Judges: Raghubar Dayal, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Raghubar Dayal, J.

The question of law referred to us for decision is whether the non framing of a charge u/s 34, Penal Code, is a bar to the conviction of a person for an offence by invoking the aid of Section 34, Penal Code, or not?

2. In actual practice the question arises in various ways, and they depend on the original charge framed against an accused in a particular case. Accused may be charged with a particular offence without any mention in the charge that they had acted in furtherance of a common intention or without any reference to Section 34, Penal Code, and be sought to be convicted of that offence read with Section 34, Penal Code. Accused may be charged with an offence read with Section 149, Penal Code, and ultimately conviction may be sought with respect to that offence read with Section 34, Penal Code. Two other types of cases; which can arise, but which do not really come-within the purview of the question referred to us, can be whether accused charged with an. offence read with Section 149, Penal Code, or with an offence read with Section 34, Penal Code, can be convicted of the substantive offence only, and we do not propose to answer these two questions.

3. In the revision which has given rise to this reference a number of accused were tried for riot and for an offence u/s 825 read with Section 149, Penal Code. Ultimately accused less than five in number were convicted. Their conviction was

recorded, therefore, u/s 325 read with Section 34, Penal Code. The question in revision was whether they could be so convicted under law.

4. We are of opinion that the mere omission, to mention Section 34, Penal Code, in the-charge does not bar a conviction of the accused for an offence read with Section 34, Penal Code.

5. Section 34, Penal Code, does not create an. offence. It simply lays down a principle of criminal liability. It is, therefore, not necessary to mention it in the charge.

6. Section 225, Criminal P.C., is:

No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

7. This indicates that any error in the particulars of a charge and even omission to state the offence or particulars is not to be regarded as material, unless the accused has been misled and there has been a failure of justice.

8. Section 232, Criminal P.C., considers the effect of a material error in the charge, and its Sub-section (1) is:

If any appellate Court, or the High Court in the exercise of its powers of revision or of its powers under Chap. 27, is of opinion that any person convicted of an offence was misled in his defence by the absence of a charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

This means that if an error in the framing of the charge has misled the accused in his defence, the appellate Court cannot acquit him on account of the error, but is bound to order a re-trial. This indicates that the mere absence of a charge or an error in a charge would not make the whole trial illegal or would make the conviction for a certain offence illegal unless the accused bas been misled.

9. Again, Section 535, Criminal P.C., provides as follows:

(1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless in the opinion of the Court of appeal or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge.

Its terms also make it clear that the omission to frame a charge will not invalidate any finding or sentence, unless failure of justice has been occasioned. Section 537,

Criminal P.C., provides:

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter 27 or on appeal or revision on account - (a) of any error, omission or irregularity in the...charge...unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice.

10. All these various provisions of the Criminal Procedure Code have one thing in common, and that is that unless the accused is misled and failure of justice has occurred, any error or omission in the charge will not justify the setting aside of the conviction. What happens when an accused is convicted of an offence read with Section 34, while he is charged either for that offence read with Section 149, Penal Code, or with that offence only, is that the Court omits to mention the circumstances justifying the operation of Section 34, Penal Code, in the charge or, in addition to the omission, mentions different circumstances justifying a reference to Section 149, Penal Code, in the charge. If the facts alleged and proved in a case justify the applicability of Section 34, Penal Code, the mere fact that the Court has framed the charge with the help of Section 149, Penal Code, or without it and without a mention of Section 34, Penal Code, will not bar the Court from recording a conviction of the accused for that offence read with Section 34, Penal Code, unless of course the accused is found to have been prejudiced in some manner.

11. Further the provisions of Sections 236 and 237, Criminal P.C., will also justify the conviction of an accused for an offence read with Section 34, Penal Code, even if he was not so charged and was charged either with the substantive offence or with the substantive offence read with Section 149, Penal Code. Sections 236 and 237, Criminal P.C., are:

236. If a single act or series of acts is of such a nature that 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 charge may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

237. 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 ha is shown to have committed, although he was not charged with it.

12. The former authorises the Court to frame charges for as many offences against the accused as the Court thinks that the facts which can be proved will constitute. This means that when the facts alleged and proved make out an offence against the accused, the accused can be convicted of that offence, irrespective of the consideration whether he was charged with that offence or not, for u/s 236, Criminal

P.C., the Court could have charged him with that offence, and Section 237, Criminal P.C., provides that the accused could be convicted of that offence even if he was not charged with it.

13. This is, to our mind, what was clearly held by their Lordships of the Privy Council in AIR 1925 130 (Privy Council) . The question before their Lordships was whether accused charged with an offence u/s 302, Penal Code, could be convicted of an offence u/s 201, Penal Code. After quoting the two sections their Lordships observed at page 231:

The illustration makes the meaning of these words quite plain. A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. That is what happened here. The three men who were sentenced to rigorous imprisonment were convicted of making away with the evidence of the crime by assisting in taking away the body. They were not charged with that formally, but they were tried on evidence which brings the case u/s 237.

Their Lordships entertain no doubt that the procedure was a proper procedure and one warranted by the Code of Criminal Procedure.

14. In this view of the matter it appears to us that the omission to mention Section 34 in the charge, be it of a substantive offence or be it of a substantive offence read with Section 149, Penal Code, is no bar to the recording of the conviction for that offence read with Section 34, Penal Code, if the facts alleged and proved justify the application of Section 34, Penal Code, against the accused.

15. The argument that Section 149, Penal Code, creates a distinct offence does not affect the consideration of the question on the lines indicated above.

16. So far as the case law is concerned, the concensus of opinion favours the view expressed above. Such cases are of two types. The decision in one set of cases proceeds on the assumption of law to be as held above, but does not discuss the point, which was probably not raised. In this set of cases is the Privy Council case reported in Barendra Kumar v. Emperor . The accused in that case was charged u/s 302, Penal Code, but was convicted of the offence of murder by invoking the provisions of Section 34, Penal Code. This question was not raised before their Lordships of the Privy Council and was not, therefore, discussed in the judgment. It is not clear whether it was raised before the Calcutta High Court either, but one of the Judges, Cuming J., observed at p. 312 in the case reported in The King Emperor Vs. Barendra Kumar Ghose, .

Section 34 and the connected Sections 35, 36, 37 and 38 Create no substantive offence. They are merely declaratory of a principle of law, and in charging an accused person it is not necessary to cite them in the charge.

17. In Ram Rup v. Emperor AIR 192 All. 31 Wali Ullah J. set aside the conviction of certain accused under Sections 147 and 323/149, Penal Code, and convicted them of the offence u/s 823 read with Section 84, Penal Code.

18. In Irshadullah Khan and Others Vs. Emperor , Young and Eachhpal Singh JJ. maintained the conviction of the appellants under Ss 302 and 302/34, Penal Code, when they were originally charged u/s 302 read with Section 149, Penal Code.

19. In both these cases of this Court the question was not raised that the conviction of the accused with the help of Section 34, Penal Code, was bad in law and consequently the question was not discussed.

20. Though a contrary opinion was expressed, but the question was not discussed by Mulla J. in Bishuwanath and Others Vs. Emperor, . He observed at p. 635:

Where the prosecution invokes the aid of Section 34, Penal Code, for holding one person responsible for the result produced by the act of another, it is in my judgment necessary to frame a charge under that section. Omission to do so is in my opinion a vital defect and the result is that the man can be held responsible only for the result of an act committed by himself. Besides this technical point, I find that the circumstances of the case as established by the prosecution evidence did not justify the application of Section 34, Penal Code.

For the reasons given above we feel unable to agree with this view.

21. We need not refer to the cases of the other High Courts in which the question has not been discussed. The only case of this Court which has come to our notice and which gives certain reasons for not convicting an accused by invoking the aid of Section 34, Penal Code, is the case in Chedda Singh v. Emperor AIR 1924 All. 766. In this case the accused was the only person on trial. The charge framed against him indicated that, he himself had caused the grievous hurt. The evidence failed to establish this point. Two other persons had been convicted for causing that grievous hurt in a previous trial. It was, therefore, urged on behalf of the Crown that there was common intention on the part of the several accused to beat the members of the other party and that, therefore, a conviction could properly be arrived at with the aid of Section 34, Penal Code. This contention was not accepted. Boys J. observed:

It is clear to me, therefore, that there is no section which will justify me in altering the charge and proceeding now to a conviction on that charge. It would really mean convicting the accused by bringing in two new facts which he was never asked in any way at all to meet in the lower Court. Those two new facts being:

1. Not that he himself but somebody else of his companions struck the accused;

2. that blow was struck in pursuance of a common intention.

22. These observations indicate that it was considered that the accused would be prejudiced by the course suggested, as he had no notice of these two facts in the special circumstances of that case.

23. The cases reported in Chedda Singh v. Emperor AIR 1924 All. 766 Bhondu Das v. Emperor AIR 1929 Pat. 11 and Rama Boyan and Others Vs. Emperor, , are cases in which persons charged with offences read with Section 149, Penal Code, were convicted of offences read with Section 34, Penal Code.

24. The cases reported in Nura v. Emperor AIR 1934 Lah. 227 Waryam Singh v. Emperor AIR 1941 Lah. 214Nga The Htin v. Emperor AIR 1935 Ran. 304 and Mitho v. Emperor AIR 1934 Sind. 89 are cases in which accused charged with the substantive offence have been convicted of that offence by invoking the aid of Section 34, Penal Code.

25. The Calcutta High Court took the view in certain cases that a person charged with an offence read with Section 149, Penal Code, cannot be convicted of the substantive offence or that offence read with Section 84, Penal Code. One of the cases is reported in Reazuddi v. Emperor 16 C.W.N. 1077. We do not agree with the view expressed in this case and may say that it was expressed before the decision of their Lordships of the Privy Council in AIR 1925 130 (Privy Council) . In this connection reference may be made to the case in Dibakar (Bene) Vs. Saktidhar Kabiraj, , where Suhrawardy and Cammiade JJ. observed that the view that where a person is charged, under one offence and convicted of a different offence by the appellate Court with which he was not charged it is beyond the power of an appellate Court u/s 423(b)(2), has been modified to some extent by the decision of the Judicial Committee in AIR 1925 130 (Privy Council) . They further observed at page 478:

It is, therefore, correct to say that the law as it stands at the present moment is that if on the facts proved of which the accused may be taken to have notice another offence appears to have been committed by him and if on those facts it seems doubtful as to which offence the accused has committed, he may be convicted under Sections 236 and 237, Criminal P.C., of the other ofienco.

We, therefore, answer the question in the negative and hold that a person can be convicted of an offence read with Section 34, Penal Code, if the facts of the case justify it and if the accused has not been misled in his defence and if there has been no failure of justice, irrespective of the fact whether the charge framed against him mentioned Section 34, Penal Code, or not, or the charge framed against him was a charge of an offence read with Section 149, Penal Code.