Ismail Rasul Shaikh Vs The State of Gujarat

Court: Gujarat High Court

Date of Decision: Jan. 9, 1964

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€" Section 239
Penal Code, 1860 (IPC) â€" Section 279, 279 , 304, 304, 337

Citation: (1964) 5 GLR 526

Hon'ble Judges: V.B. Raju, J

Bench: Single Bench

Judgement

V.B. Raju, J.
The applicant who was accused No. 1 at the trial was convicted under Sections 279 304 337 and 338 Indian Penal Code.

The conductor was accused No. 2 at the trial. The prosecution case was that a bus over-loaded with 92 passengers was being driven by accused

No. 1 who was the driver. He was driving the bus rashly and negligently and thereby caused the death of 69 persons Both accused Nos. 1 and 2

were tried together.

2. In revision it is contended that a joint trial is contrary to the provisions of Section 239 Cri. Pro. Code which will hereinafter be referred to as the

Code. u/s 239 of the Code two different accused persons can be charged and tried together in the circumstances mentioned in that section which

so far as relevant reads as follows:

The following persons may be charged and tried together namely:

(a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment or of an attempt to commit such offence;

(c) persons accused of more than one offence of the same kind within the meaning of Section 234 committed by them jointly within the period of

twelve months;

(d) persons accused of different offences committed in the course of the same transaction.

Accused Nos. 1 and 2 were charged with the same offence for having contravened the provisions of Sections 121 123 and 124 of the Motor

Vehicles Act. That is justified by Clause (a) of Section 239 of the Code. But in regard to the offence of rash and negligent driving there is only a

charge against accused No. 1 and there is no charge of rashness and negligence against accused No. 2.

3. The question is whether the trial of two accused persons one of whom was charged with the offence of rash and negligent driving and the other

is charged with the offence of over-loading is justified by Section 239 of the Code. The trial would be legal if the person"s accused of different

offences committed them in the course of the same transaction. The expression same transaction is used in Section 239 and also in Section 235 of

the Code which refers to the trial of one accused for more than one offence. The meaning of the words same transaction has been referred to in

many cases and the Courts have indicated various tests to decide whether different acts are parts of the same transaction or not namely proximity

of time unity of place unity or community of purpose or design and continuity of action. But some of the tests are not helpful or conclusive. To take

an instance. If a person while driving a car rashly and negligently causes deaths of three persons that would be one transaction although three

different offences are com mitted. There would be no community of purpose because it is not the purpose of the accused to drive the car rashly or

negligently or to cause the death of three persons. The test of community of purpose or design even when applied to two different persons is not a

proper test to be employed. The test of proximity of time is also not quite correct because two offences committed at the same time do not

necessarily form the same transaction and two offences which are not committed at the same time may form one transaction. Therefore the test of

proximity of time is not a conclusive test. The same remark applies to the test of unity of place because two offences committed at the same place

may not form part of the same transaction while two offences committed at different places may form the same transaction. Therefore the test of

place is not conclusive.

4. The test of community of purpose is not quite proper but the real test is continuity of action. If one accused or different accused persons have

continuity of action in regard to different offences the different offences would be part of the same transaction. As observed by Justice Broomfield

in Shapurji Sorabji v. Emperor ILR 60 Bom 148 . 156 unity of place and proximity of time are not important tests at all. The learned Judge

referred to the observations of Krishnan J. in Mallavya v. King Emperor ILR 49 Mad 74 that the main test is unity of purpose though continuity of

action goes with it. As Broomfield J. rightly observed that is a very important qualification. As Broomfield J. observed It is obvious that there may

be unity or community of purpose in respect of a series of transactions or several different transactions and therefore the mere existence of a

common purpose cannot by itself be enough to convert a series of acts into one transaction. I fully agree with the view that proximity of time unity

of place and unity or community of purpose or designs are not decisive tests but the decisive test is continuity of action. Regarding continuity of

action I also agree with the following observations of Broomfield J. in ILR 60 Bom 148 (supra):

The main test mast really be continuity of action. We have to consider what that expression means. It cannot mean I think merely doing the same

thing or similar things continuously or repeatedly for a recurring series of similar transactions is not according to the ordinary use of language the

same transaction Continuity of action in the context must in my opinion mean this: the following up of some initial act through all its consequences

and incidents until the series of acts or group of connected acts comes to an end either by attainment of the object or by being put an end to or

abandoned. If any of those things happens and the whole process is begun over again it is not the same transaction but a new one in spite of the

fact that the same general purpose may continue.

5. In the case of different offences committed by different accused persons however continuity of action implies a community of purpose or design.

If an offence committed by P and another offence committed by Q form the same transaction there must be a continuity of action between the two

offences and also community of purpose between P and Q in the commission of the two offences whether the community of purpose is sufficient to

justify the framing of a charge of conspiracy or not.

6. We have therefore to see whether in this case there is a continuity of action with the implicit community of purpose or design between the driver

and the conductor in the commission of the offence of over-loading by the conductor and the commission of the offence of rash and negligent

driving by the driver. There can be no continuity of action or community of purpose even if the offence of over-loading is a continuing offence and

continued right upto the time there was a rash and negligent driving on the part of the driver.

7. It is next contended however that to a case like this provisions of Section 537 of the Code would apply. Section 537 of the Code reads as

follows:

Subject to the provisions hereinafter contained no finding sentence or order passed by a Court of competent jurisdiction shall be reversed or

altered under Chapter XXVII or on appeal or revision on account-

(a) of any error omission or irregularity in the complaint summons warrant proclamation order judgment or other proceedings before or during trial

or in any inquiry or other proceedings under this Code or

(b) of any error omission or irregularity in the charge including any misjoinder of charges or

(c) of the omission to revise any list of jurors in accordance with Section 324 or

(d) of any misdirection in any charge to a jury unless such error omission irregularity or misdirection has in fact occasioned a failure of justice....

Clause (b) of this section has been added by Act 26 of 1955. It is this Clause (b) which is relied upon by the learned Government Pleader. But in

my opinion Clause (b) has Do application because this is not a case of mere error omission or irregularity in the charge. This is a case of an

improper mode of trial right from the beginning to the end a mode of trial not permitted by the Code namely the trial of two different accused

persons under circumstances in which a joint trial is not permitted. An infringement of a provision of the Code as to the manner of trial cannot be

cured by Section 537 of the Code But if the trial has commenced regularly and properly and there js an error omission or irregularity in the charge

framed in the course of the trial or any mis-joinder of charges in regard to the charges framed in the course of regular trial then Section 537 of the

Code would apply. The same view has been taken by the Bombay High Court in State Vs. Ganpat and Others, . But a different view has been

taken in Ahmad Hussain v. Stage AIR 1958 All 433 It was there held that the words mis-joinder of charges used in Clause (b) of Section 537 of

the Code apply to mis-joinder of offences as well as to mis-joinder of accused persons and that where the mandatory provision of Section 239 of

the Code has not been followed any irregularity in the trial of the accused is cured by Clause (b) of Section 537 of the Code. The learned Judge

has followed the case of Ram Kishan Vs. State, and did not follow the cases of Wazir Vs. Sarju Bhar and Others, and Abdul Aziz v. Rex AIR

1950 All. 364. If we look at Section 239 of the Code the first sentence reads thus:

The following persons may be charged and tried together.It therefore not only deals with a joint charge but also deals with a joint trial whereas

Clause (b) of Section 537 of the Code deals with joinder of charges and makes no mention of joint trials. Apart from amendments or additions

charges are framed at one stage of the trial. Under certain circumstances the trial of two different accused persons is permitted u/s 239 of the

Code. This section also permits joint charges against such accused persons. The expression "joinder of charges might include joinder of charges

against different accused persons. But the word "trial has not been used in Clause (b) of Section 537 of the Code whereas it has been used in

Section 239 and Section 233 of the Code. Section 233 of the Code provides that every charge shall be tried separately except in the cases

mentioned in Sections 234 235 236 and 239. There can be a mis-joinder of charges against one accused person and it is quite likely that Clause

(b) of Section 537 of the Code was intended to apply to such cases. In view of the fact that the words tried together have been used in Section

239 of the Code it is difficult to hold that Section 537 of the Code would apply to a contravention of the provisions of Section 239 of the Code.

With great respect therefore I prefer to follow the view taken by the Bombay High Court and find it difficult to agree with the view taken by the

Allahabad High Courty.

8. In the present case although in fact the different offences may not form pah of the same transaction it was not even the prosecution case that they

formed part of the same transaction. This is a case in which different offences can never form part of the same transaction because one of the

offences is with respect to rash and negligent driving on the part of the driver. That can never form part of the same transaction with respect to the

offence committed by any other person. If in a particular case it is the case of the prosecution that two different offences committed by different

accused persons form part of the same transaction because of alleged continuity of action with implicit commur ity of purpose or design the trial

would be legal even if in fact the community of purpose is not proved. But this is not a case in which it can be suggested that th re was a community

of purpose between the rash and negligent driving of the iriver and over-loading by the conductor.

9. It is also the contention of the Learned Counsel for the applicant that the applicant has been gravely prejudiced because he was not able to

examine the conductor as a defence witness. The learned Special Magistrate was of the opinion that the offences committed by the driver and

conductor formed part of the same transaction As stated above they can never form part of the same transaction.

10. I therefore hold that the trial is bad. The aonviction and sentence of the applicant (accused No. 1) is set aside and he is ordered to be tried

afresh.