(1946) 10 BOM CK 0004

Bombay High Court

Case No: Crown Case No. 33, Fourth Criminal Sessions of 1946

Emperor		APPELLANT
	Vs	
Bashir Bundekhan		RESPONDENT

Date of Decision: Oct. 30, 1946

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 403(1)
- Penal Code, 1860 (IPC) - Section 149

Citation: AIR 1947 Bom 366 : (1947) 49 BOMLR 139

Hon'ble Judges: Sen, J

Bench: Single Bench

Judgement

Sen, J.
The original charge made against the three accused persons in this case consisted of four counts, only the second of which is material for the purposes of the question Which has been raised before me. That count was :

Secondly : That you, along with 7 or 8 other persons, on or about the date and at the place aforesaid, were members of an unlawful assembly, and in prosecution of the common object of which, viz., to assault (1) Tajdin Mahomeddin, (2) Khadim Hassan Chiragdin, and (3) Mahomed Anwar Talemahomed, one of the members of such assembly, viz., Bashir Bundekhan, accused No. 1, caused the death of the said Khadim Hassan Chiragdin, and you are thereby, u/s 149 of the Indian Penal Code, guilty of committing the said offence of murder, an offence punishable u/s 302 of the Indian Penal Code and within the cognizance of the High Court.

Or in the Alternative.

That you, on or about the date and at the place aforesaid, did commit murder by intentionally causing the death of the said Khadim Hassan Chiragdin, and aided and abetted each other in the commission of the said offence, which offence was committed

in consequence of such abetment, and thereby committed an offence punishable under Sections 302 and 100 of the Indian Penal Code and within the cognizance of the High Court.

On the first part of this count the jury unanimously held that the accused were not guilty, but on the second part (in the alternative) they were divided in opinion. The learned Judge gave judgment in accordance with the unanimous verdict; but he disagreed with the majority verdict on the charge in the alternative and ordered the retrial of the accused in respect of the said charge.

2. The question that arises for my consideration is whether, as to the charge in the alternative, the accused are entitled to the benefit of Sub-section (1) of Section 403 of the Code of Criminal Procedure, which provides:

A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made u/s 236, or for which he might have been convicted u/s 237.

There can be no doubt that each count in an indictment is, for the purposes of verdict and judgment, to be treated as a separate indictment: Latham v. R. (1864) 5 B & Section 635 and Castro v. The Queen (1881) 6 App. Cas. 229 Here, therefore, the two parts, quoted above, of the second count of the charge constitute one indictment; and the alternative heads appear to have been framed u/s 236 of the Code, which provides:

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 charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

This is not a case falling u/s 235, and therefore not under Sub-section (2) of Section 403, under which

A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial u/s 235, Sub-section (1).

Under Section 236 an accused person may be charged in the alternative where there is a single act or series of acts "of such a nature that it is doubtful which of several offences the facts which can be proved will constitute"; and in such a case, even if a charge in the alternative has not been made, the accused may be convicted of an offence not specifically mentioned in the charge, provided he could have been charged in the alternative in respect of it tinder Section 236 (s. 237). In the present case, the alternative

head, having been framed u/s 236, must, I think, be deemed to have been based on the same facts as those on which the first head was based, for presumably both heads are based on "a single act or series of acts", the legal nature of which is doubtful, it not being clear what offences the facts which can be proved would constitute. The basis of a charge, however, is not the facts that may ultimately be held proved but the facts alleged by the prosecution at the commencement of the trial; and it is the duty of the jury, u/s 299 of the Code, after hearing the evidence, to decide Which view of the facts is true and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned.

3. If, therefore, the two alternative heads of charge in question are based on the same facts according to the prosecution case, and the accused have been acquitted of the charge of murder under Sections 302 and 149 of the Penal Code, they cannot, u/s 403 of the Criminal Procedure Code, be tried again "on the same facts for which a different charge from the one made against them might have been made u/s 236, or for which they might have been convicted u/s 237."

4. Mr, Amin, appearing for the Crown, has contended that the provisions of Sub-section (1) of Section 403 cannot apply, as this is not a retrial and as this is not a case in which the accused "might have been" charged under ss. 302 and 109, having actually been so charged; he has relied, in support of both the arguments, on the case of Emperor v. Nirmal Kanta Roy I.L.R.(1914) Cal. 1072. The argument as to retrial is that the present trial being a continuation of the original trial, it cannot be regarded as a retrial for the purposes of Section 403. A recent decision by a full bench of our High Court, Government of Bombay Vs. Abdul Wahab, has also been brought to my notice, though Mr. Amin has not referred to that case. In that ease it was held that in view of the provisions of Section 305, Sub-section (3), and Section 308 of the Code, "a retrial resulting from the disagreement of the Judge with the jury u/s 305 and as provided by Section 308 is not a new trial as contemplated by Section 403". In Emperor v. Abdul Wahab, (1944) 47 Bom. L.R. 998 the case out of which the case at 47 Bom. L.R. 998 arose, Divatia J. has also taken the view that Section 403 does not apply to cases falling under Sections 305 and 308, where the former trial is not complete and the accused has been neither convicted nor acquitted of the offence when the jury is discharged (p. 820). It seems to me important to point out that in neither of the two cases, Emperor v. Nirmal Kanta Boy and Government of Bombay v. Abdul Wahab did the Court have to deal with a case containing alternative heads of charge such as the original charge in the present case; nor was there any alternative head of charge in Emperor v. Abla Isak I.L.R(1931) . 55 Bom. 520which was overruled in Abdul Wahab"s case. In Abla Isak"s case the accused were charged with murder and abetment of murder and with robbery and hurt and abetment thereof, and the Judge, in his summing-up, asked the jury that if they were not satisfied that an offence of murder was made out, it was open to them to return a verdict of guilty of culpable (homicide not amounting to murder and abetment of it. The jury returned a unanimous verdict of not guilty on the charge of murder but were divided by

five to four on the other charges; and the Judge acquitted the accused on the charge of murder and discharged the jury as to the other charges. There was a retrial of the accused on charges of culpable homicide not amounting to murder and robbery and hurt, and of abetment thereof. The Judge held that the accused could not be tried again for the offence of culpable homicide not amounting to murder and abetment thereof as there had been no specific charge for "the said offences. This decision has been overruled on. the ground that the Judge overlooked the provisions of Sections 299 and 238. Thus the case fell u/s 238, not Section 236. Similarly in Abdul Wahab"s case the accused was charged with murder, and the Judge, in his summing-up, directed the jury to consider their verdict not only as regards the offence of murder but also in respect of the two offences of culpable homicide not amounting to murder and grievous hurt, which had not been mentioned in the charge. The jury returned a unanimous verdict of not guilty in respect of the offences of murder and culpable homicide not amounting to murder, and gave a divided verdict (six to three) of not guilty in respect of grievous hurt. The learned Judge disagreed with the majority verdict, but considering himself bound by the decision in Abla Isak"s case ordered that the accused be acquitted and discharged. There was an appeal by the Government of Bombay against the order of acquittal and the appeal was heard by a full bench. The appellate bench overruled the decision in Abla Isak"s case and ordered the accused to be retried u/s 326 of the Indian Penal Code. Here again, it is clear that the case fell u/s 238 of the Criminal Procedure Code and not Section 236. Counsel for the accused sought to bring in the protection of Section 403 by contending that the accused might have been charged for the offences of culpable homicide not amounting to murder and grievous hurt u/s 236, but this was clearly an untenable argument, as the proper section applicable in such a case was Section 238; for if the prosecution alleged that there was a ease for trying the accused for grievous hurt, that would be a case of injuries caused such as endangered life, and thus be a case of an offence consisting of particulars which constituted a "complete minor offence" within the meaning of Section 238, Sub-section (1).

5. In Emperor v. Nirmal Kanta Boy the accused had been charged with the murder and abetment of murder of a police-officer and also with the murder and culpable homicide not amounting to murder of another person. The jury returned an unanimous verdict of not guilty in respect of the murder of the police-officer as well as of the murder of the second person but brought in a verdict of five to four on the charge of culpable homicide of the latter. The jury was discharged and the accused was put up before another jury. The learned Judge held that the prisoner was not being "tried again" within the meaning of Section 403 but that his trial was still on the original indictment and plea, that the Court was continuing the trial before another jury and that the process could continue till a verdict was proved on all the counts. It will be seen that here again the charge of culpable homicide not amounting to murder was a charge of a minor offence falling u/s 238 and not u/s 236; the charge, though expressly made and not the subject-matter of a direction of the Judge, was not one alternative to the charge of murder. The decisions in the cases of Nirmal Kanta Roy and Abdul Wahab, therefore, dealt with the question of the

applicability of the provisions of Section 403 of the Criminal Procedure Code to cases in which the charges fell u/s 238 and where there was no question of alternative heads of charges, the accused having been acquitted under one of such charges. The latter kind of cases seem to me to differ in certain material respects from the cases of the nature of Nirmal Kanta''s or Abdul Wahab''s case. In the first place, a charge for a particular offence and one for a minor offence consisting of some of the particulars of the major offence are not based on the same facts, because either a smaller number of particulars have to be proved (s. 238, Sub-section (1)) or an additional fact or additional facts have to be proved (s. 238, Sub-section (2)) to substantiate the latter kind of charge; so that, even supposing that after the major charge has been tried first and then the accused is separately tried on the minor charge, i.e. when there is no question of the second trial not being a retrial, the provisions of Section 403, Sub-section (1), would not in terms apply. Secondly, taking the case where the accused can be charged in the alternative, supposing that he is first tried on only one of the possible charges and he is acquitted, and that thereafter he is again tried on the alternative charge, Section 403, Sub-section (1), would no doubt in terms apply; and it seems to me difficult to conceive that the Legislature intended, the fate of the accused in respect of the alternative charge to depend on the accident whether the earlier trial was on both the counts or on one. It seems to me that a charge for a major offence and one for a minor offence must be regarded as two separate indictments and that a charge in respect of two alternative heads must count as one indictment. Therefore, if the accused is acquitted or convicted on one of the heads in the latter case, the accused, it seems to me, is entitled to say that he has been acquitted on that indictment, although the verdict of the jury on the alternative count does not also result in his acquittal or conviction. His acquittal has certainly been based on the same facts as those whereon the alternative head was based. If that be the correct position, if he is again put up for trial on the alternative count, that must be regarded as a fresh trial, so far as the original indictment is concerned. The emphasis in Section 403, Sub-section (1), seems to me to be on the expressions "for the same offence" and "on the same facts" rather than on the technical requirements of a new trial. It is to be remembered that in this case, the Judge, who tried the case originally, has in terms directed the "retrial" of the accused, in conformity with the use of the expression "retrial" in Section 308 as well as with its marginal note and the ''heading preceding that section. It does not appear to me possible in this case to dispense with the provisions of Sections 271 and 272 of the Code if the accused has to be tried. u/s 271 the charge is to be read out after the accused is brought to the Court "when the Court is ready to commence the trial"; the word "commence" suggests a new trial. u/s 272, after the jurors are empanelled, the Court is to proceed "to try the case". This expression, again, seems to me to preclude continuation of the original case. These considerations no doubt may appear to reflect on the decision in Abdul Wahab''s case. But my object in referring to them, if I am correct in holding that the present case is distinguishable from that case as well as Nirmal Kanta''s case, is to support the view that so far as the facts of the present case are concerned there are important reasons for holding that the present trial is a retrial for the purposes of Section 403.

As to the expression "for which a different charge from the one made against him might have been made" in Section 403, the argument that such is not the case here seems to me to be without much substance. This argument also was upheld in Nirmal Kanta"s case. It seems to me, however, that this phraseology is not intended to exclude a case in which a charge in the alternative has actually been made u/s 236; for otherwise the question whether the accused is to have the benefit of the principle of autrefois acquit or autrefois convict would depend on a mere accident. u/s 236 the charge in the alternative need not be made, for "the accused may be charged with having committed all or any" of the probable offences; and if such charge had not been made, he could, in a case falling under the said section, still be convicted (under Section 237) as if it had been made. In R. v. Grimwood 60 J.P. 809 the indictment contained counts for inflicting grievous bodily harm, unlawful wounding, assault occasioning bodily harm and common assault, and the jury convicted the accused of common assault but disagreed on the other counts; and it was held, on a retrial on the other counts, that the conviction for common assault would support a plea of autrefois convict,

Accordingly, u/s 273 of the Criminal Procedure Code an entry will be made on the charge in this case that the portion thereof, which I have described as the second part of count (2), is clearly unsustainable.