
(1907) 11 BOM CK 0009

Bombay High Court

Case No: Fifth Criminal Sessions of 1907

Emperor

APPELLANT

Vs

Kashia Antoo

RESPONDENT

Date of Decision: Nov. 23, 1907

Acts Referred:

- Penal Code, 1860 (IPC) - Section 114, 379

Citation: (1908) 10 BOMLR 26

Hon'ble Judges: Russell, J

Bench: Single Bench

Judgement

Russell, J.

The point of law which arises in this case does so under the following circumstances.

2. The accused Basir Shaik Hassan, a Mahomedan, was found guilty by a Common Jury of offences under Sections 379 and 114 of the Indian Penal Code of theft and the abetment thereof as in Section 114. It appears that the accused when a juvenile was found guilty of theft on the 21st October 1902 and was then sentenced to whipping, and the question now is whether that previous conviction can be put-in evidence against him now. This question depends upon the correct construction to be placed upon Section 75.

75. Whoever having been convicted of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards shall be guilty of any offence punishable under either of those chapters with imprisonment of either description for a term of three years or upwards, shall be subject for every such subsequent offence to transportation for life, or to imprisonment of either description for a term which may extend to ten years.

3. It has been held in *Empress v. Nana Rahim* (1880) L.R.R. 5 Bom. 140, *Empress of India v. Ram Dayal* ILR (1881) All. 773, *Queen-Empress v. Sricharan* ILR (1887) Cal. 357, *Queen-Empress v. Ajudhia* (1895) L.R.R. 17 All. 120, and *Queen-Empress v. Bharosa* (1895) L.R. R. 17 All. 123, that an enhanced punishment cannot be awarded where the offence subsequently committed is merely an attempt to commit an offence punishable under Chapter XII or XVII. In other words those Courts decided that where a subsequent offence is an attempt u/s 511, it cannot be used for the purpose of enhancement of sentence u/s 75. In Mr. Mayne's work on the Criminal Law of India and Messrs. Ratanlal and Dhirajlal's work on the Law of Crimes, it is said that the enhanced punishment cannot be awarded for the abetment of an offence punishable under Chapter XII or XVII; but the authorities, I have referred to, do not deal with the question of abetment but with the question of an attempt u/s 511.

4. In the first place in my opinion, it is necessary to look at the exact words of Section 75 of the Indian Penal Code.

5. It will be observed that the words are "shall be guilty of any offence punishable under either of those Chapters" i. e. XII or XVII. The words are not "punishable under Chapter XII or XVII of this Code together with such other sections as may be considered together with those Chapters to constitute an offence" but expressly "under either of those Chapters." It seems to me nothing could have been easier for the Legislature, had it intended the abetment of an offence under either of these Chapters to be included u/s 75, than to have said so; but it has not said so. That appears to me to be one argument against that raised by Mr. Jafferbhoy for the prosecution in this case.

6. Then another argument arises on Section 114:

114. Whenever any person who if absent would-be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment-is committed, he shall be deemed to have committed such act or offence.

7. It does not say: "he shall have committed such act or offence," but "he shall be deemed to have committed such act or offence." In other words, he is to be treated in the same way as if he had committed the offence. That is not the same thing to my mind as saying he has committed the offence under either Chapter XII or XVII of the Code. Mr. Justice Chandavarkar has recently put a construction upon the words "shall be deemed" when used by the Legislature as follows:-When one thing is not the same as another thing, but the Legislature says that it "shall be deemed to be" the same thing, it creates a legal fiction, and in that case "The Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to" per James L.J. in *Ex parte Walton* (1881) 17 Ch. D. 746. And fictions created by law shall never be contradicted so as to defeat the ends for which they are invented, though for every other-purpose they may be contradicted

(Mostyn v. Fabrigas (1774) 177.-Emperor v. Atmaram ILR (1907) 31480 ,

8. It appears to me that this is a correct construction to be put upon those words.

9. The effect of Section 114, therefore, is that if a man is present at a commission of an offence he is to be deemed to have committed it not that he has committed it.

10. I am, therefore, of opinion under the circumstances that the evidence of the previous conviction of the accused is not admissible against him.

11. Accordingly, I sentence the accused to two years and six months rigorous imprisonment, the theft having been a very impudent one and in open day.

12. It is hardly necessary for me to say that in passing this sentence, I pay no regard whatever to the previous conviction.