

(2007) 11 CAL CK 0001
In the Calcutta High Court
Case No : C.R.R. No. 4130 of 2006

Anwar Hossain alias Anowar Hossain and Others	APPELLANT
Vs	
The State of West Bengal	RESPONDENT

Date of Decision : 21-11-2007

Acts Referred:

Constitution of India, 1950 — Article 20, 20(2), 20(3)
Criminal Procedure Code, 1973 (CrPC) — Section 221(1), 221(2), 300, 300(1), 300(4)
Explosives Act, 1884 — Section 9
General Clauses Act, 1897 — Section 26
Penal Code, 1860 (IPC) — Section 147, 148, 149, 307, 323

Citation : (2008) 1 CALLT 382

Hon'ble Judges : Ashim Kumar Roy, J

Bench : Single Bench

Advocate : Joymalya Bagchi and Rajib Lochan Chakraborty, for the Appellant;
Swapan Kumar Mallick, for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Roy, J.—The subject matter of challenge in the instant criminal revision is an order passed by the learned Additional Sessions Judge, 1st, Fast Track Court, Jangipur, Murshidabad, in connection with the Sessions Trial No. 1 of November, 2006, arising out of Sessions Serial No. 36/04 rejecting the petitioners prayer for discharge.

2. Mr. Joymalya Bagchi, the learned advocate appearing on behalf of the petitioners submitted before this Court that the impugned trial of the petitioners is wholly illegal and without jurisdiction being hit by the prohibition contained in the provisions of Section 300(1) of the Code of Criminal Procedure and in Article 20(2) of the Constitution. According to Mr. Bagchi, the impugned trial of the petitioners before the learned Additional Sessions Judge, First Fast Track Court, Jangipur, Murshidabad is not legally permissible since over the self-same occurrence and on the same allegation the petitioners were earlier tried by the learned Judicial Magistrate, First Class, Second Court, Jangipur, Murshidabad in

T.R. 361/01 and have been acquitted and the said order of acquittal is still in force. On the other hand, Mr. Swapan Kumar Mallick, the learned advocate appearing on behalf of the State strenuously disputed the contentions of Mr. Bagchi and submitted that on the grounds as urged by Mr. Bagchi, the petitioners are not entitled to discharge from the impugned, trial as in the facts and circumstances of the instant case the said provisions have no manner of application and the grounds are not tenable.

3. Heard, the learned Advocates of the parties. Perused the materials on record. Considered.

4. Upon perusal of the materials on record it appears that in T.R. 361/01 only the petitioner No. 1 Anwar Hossain @ Anowar Hossain and the petitioner No. 4 Samsul Alam @ Samsul Haque were tried by the learned Judicial Magistrate, 2nd Court, Jangipur, for the commission of the alleged offences punishable under Sections 341/379/323 of the Indian Penal Code and acquitted. However the remaining other petitioners viz. the petitioner No. 2 Tajamul Haque, the petitioner No. 3 Tilak Das, the petitioner No. 5 Biman Das, the petitioner No. 6 Apurba Kumar Chowdhury, the petitioner No. 7 Nefaur Rahaman and the petitioner No. 8 Subrata Das were neither tried in the said trial nor in any other trial for any offences arose out of the same facts or on the self-same occurrence or allegations and either acquitted or convicted, as such their trial in Sessions Trial No. 1 of November, 2006, i.e. in the impugned trial before the learned Additional Sessions Judge, 1st Fast Track Court, Jangipur, Murshidabad cannot be questioned on the ground the same is prohibited either u/s 300 of the Code of Criminal Procedure or under Article 20(3) of the Constitution as urged in the instant criminal revision. The instant criminal revision so far as the petitioner No. 2, petitioner No. 3, petitioner No. 5, petitioner No. 7 and the petitioner No. 8 are concerned being without any cause of action is not maintainable and is dismissed.

5. Thus the instant criminal revision only survives as far as the petitioner No. 1, Anwar Hossain @ Anowar Hossain and the petitioner No. 4 Samsul Alam @ Samsul Haque are concerned and that too for a decision whether the impugned trial as far as they are concerned is hit by the provisions of Section 300(1) of the Code of Criminal Procedure and the Article 20(2) of the Constitution.

6. The provisions of Section 300(1) of the Code of Criminal Procedure and the provisions of Article 20(3) of the Constitution run as follows:

The Section 300(1) of the Code of Criminal Procedure.

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 under Sub-section (1) of Section 221 or for which he might have been convicted under Sub-section (2) thereof.

The Article 20 of the Constitution.

No person shall be prosecuted and punished for the same offence more than once.

7. A bare reading of the provisions of Section 300(1) of the Code of Criminal Procedure it is abundantly clear that no trial of any person for any offence is legally permissible, when for the same offence the said person was earlier tried by a Court of competent jurisdiction and nor on the same facts for any other offence either convicted or acquitted of such offence, so long as such conviction or acquittal remains in force whereas under the provisions of Article 20(3) of the Constitution the prosecution of a person for an offence is prohibited where such person was earlier prosecuted for the same offence and punished.

8. I have carefully perused the materials on record and found that the petitioner No. 1, Anwar Hossain and petitioner No. 4 Samsul Alam @ Samsul Haque were tried by the learned Judicial Magistrate, 2nd Court, at Jangipur under Sections 341/379/323 of the Indian Penal Code arising out of the Suti Police Station Case No. 2, dated 3.12.1988 and were acquitted, whereas in the impugned trial the said two accused persons along with six others have been charged u/s 147/148/149/332/307 of the Indian Penal Code and u/s 9(b)(ii) of the Explosives Act arising out of Suti Police Station Case No. 1, dated 3.12.1988 I found that the offences for which the petitioners have been charged in the impugned trial before a Court of Sessions are completely distinct and different from that of the offences for alleged commission of which, the petitioner No. 1 and 4 were earlier charged and acquitted by the Court of Judicial Magistrate. The complainant as well the facts of both the cases are not same.

9. In this connection it would be more apposite to refer to the provisions of Section 300(4) of the Code of Criminal Procedure which is read as follows:

A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged.

10. In view of the aforesaid provisions subsequent trial of an accused for any offence is not prohibited even when such person was acquitted or convicted of any offences constituted by the same act, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged. In the instant case, not only the offences for which the petitioners were tried and acquitted are completely distinct and different from the offences for which they have been charged in the impugned trial, one of the offence u/s 307 of the Indian Penal Code for which they have now been charged in the impugned trial is exclusively triable by the Court of a Sessions, and the Court of the learned Judicial Magistrate by which the petitioner No. 1 and the petitioner No. 4 were earlier tried has no jurisdiction to hold a trial for the said offences. Thus, the

provisions of Section 300(1) of the Code cannot operate as a bar for trial of the petitioner in the impugned trial in view of the overriding effect of the provisions of Section 300(4) of the Code.

11. It is no longer *res integra* that both the Article 20(2) of the Constitution as well as Section 26 of the General Clauses Act operate as a bar to the second prosecution of an accused and the consequential punishment thereunder, must always be for the same offence that is an offence whose ingredients are the same. Similarly, the provisions of Section 300(1) also operate as a bar for trial of an accused for the same offences when he has once been tried by a Court of competent jurisdiction for an offence and either convicted or acquitted of such offence and obviously "the same offence" means an offence whose ingredients are the same.

12. In the instant case it is pertinent to note the petitioners were earlier tried and acquitted by a Judicial Magistrate for the offence punishable under Sections 341/379/323 of the Indian Penal Code, which are absolutely distinct and different from those offences for which they have been charged in the impugned trial before of a Sessions Court. Top of everything the learned Judicial Magistrate by whom the petitioners was earlier tried was never competent to hold trial for an offence punishable u/s 307 of the Indian Penal Code for which the petitioners have now been charged.

13. Therefore, in view of the findings as above, there is no prohibition against the impugned trial of the petitioner and the points urged in support of this application are not tenable.

Mr. Bagchi lastly submitted the rule of issue estoppel in a criminal trial is that where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of the accused, such a finding would constitute an estoppel or *res judicata* against the prosecution, not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted in terms of the Code of Criminal Procedure.

14. Mr. Bagchi in support of his submission relied on a decision of the Apex Court in the case of *Manipur Administration Vs. Thokchom, Bira Singh*, .

15. The relevant portion of the said decision referred by Mr. Bagchi, is quoted below:

It is common ground that the respondent cannot bring his case within the provisions of Sub-section (1) of Section 403 and it was also common ground that the trial of the respondent would be permitted by Sub-section (2). It should, however, be noticed that Sub-sections (1) and (3) of this section deal with the trial of an accused for an offence and his conviction therefor. The question raised for decision in *Pritam Singh and Another Vs. The State of Punjab*, however was

different and was whether where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of Section 403(2) .

16. According to the aforesaid decision where an issue of fact has been tried by a competent Court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution, precluding reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted in terms of Section 403(2) of the Code of Criminal Procedure 1998 which in verbatim reproduced in Section 300(2) of the Code of Criminal Procedure 1973.

17. However out of the two cases involved in the instant Criminal Revision, in the first one, the petitioner No. 1 and the petitioner No. 4 both were tried under Sections 341/379/323 of the Indian Penal Code, whereas in the impugned trial they have been charged for completely distinct and different offences punishable under the Indian Penal Code and as it appears from the offences alleged to have been committed, the issue of facts may not be same. Be that as it may, the question so raised be left for decision after the final recording of evidence.

18. In the result, I do not find any merit in the instant criminal revision and the same is dismissed and all interim order earlier granted stands vacated.

19. Urgent xerox certified copy of this Judgment if applied for be given to the parties as expeditiously as possible.