

(1990) 11 BOM CK 0011
In the Bombay High Court
Case No : Criminal Appeal No. 31 of 1989

Asaram Bhavandin Yadav

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 01-11-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 211, 212, 213, 214, 216
Essential Commodities Act, 1955 — Section 3, 7
Penal Code, 1860 (IPC) — Section 149, 302, 34, 465

Citation : (1991) 2 BomCR 397 : (1991) 93 BOMLR 847 : (1991) CriLJ 1252 : (1991) 1 MhLj 362

Hon'ble Judges : M.F. Saldanha, J

Bench : Single Bench

Advocate : N.B. Shah, for the Appellant; B.R. Patil, Public Prosecutor, for the Respondent

Judgement

1. The appellant in this case was the original accused No. 4 in Criminal Case No. 23 before the Additional Sessions Judge, Dhule. The appellant along with the other accused was charged with having committed offences punishable u/s 3 read with S. 7 of the Essential Commodities Act. The accused were also charged with certain other offences which are not very material for the purposes of the decision of this appeal.

2. The learned Additional Sessions Judge acquitted the original accused Nos. 1, 2 and 3 of all the offences with which they stood charged but as far as original accused No. 4 i.e. the present appellant is concerned, the learned Additional Sessions Judge convicted him for having committed an offence punishable u/s 3 read with S. 7 of the Essential Commodities Act. The accused was sentenced to one day's simple imprisonment till the rising of the Court and to pay a fine of Rs. 1000/- in default, R.I. for three months. It is against this order of conviction and sentence that the present appeal has been preferred.

3. Mr. Navin Shah, learned counsel appearing on behalf of the appellant has

raised a point of procedure that is fundamental to all criminal trials. Mr. Shah, in the first instance, has drawn my attention to the charge framed by the learned Additional Sessions Judge on the 2nd of February 1988. Since this issue is of some importance, the charge that was framed is reproduced below :

"Charge :

I, Shri M. N. Ahmed, Additional Sessions Judge of Dhule, hereby charge you :

1. Asaram Daulat Patil, age 46 years, residing at Thalner, Taluka Shirpur.
2. Shantilal Bhagchand Jain, age 32 years, residing at Thalner, Taluka Shirpur.
3. Ramkishor alias Kalya Asaram Yadav, age 32 years, residing at Palasner, Taluka Shirpur.
4. Asaram Bhavandin Yadav, age 64 years, residing at Palasner, Taluka Shirpur, Dist. Dhule.

As follows :

That you accused Nos. 1 and 2 on 5-1-1987 at about 7-30 p.m. on Agra Road near Aadhe Fata, were found in possession of 13 bags of wheat and 4 bags of rice, which was not available in the market and which is only sold in the fair price shop on ration card i.e. on document cards, and thus contravened Clauses 5, 7 and 20 of the Order of Maharashtra Scheduled Commodities Regulation and Distribution 1975, u/s 3 of the Essential Commodities Act, and thereby committed an offence punishable u/s 7 of the said Act, and within my cognizance.

Secondly, on the same date, time and place, you accused No. 3 a salesman of fair price shop of Palasner, Mohida and Wakwad, and you accused No. 4 being the owner of fair price shop of Palasner sold above ration articles namely 13 bags of wheat and 4 bags of rice to the accused Nos. 1 and 2 and thereby failed to distribute the same through your establishment or shop for whom they were ordered within 24 hours of receipt of the said indent from the Government godown, and thereby contravened sub-cl. 3(a) of Clause 18 of Maharashtra Food-grains Rationing (Second) Regulations, 1966, and thereby committed an offence punishable u/s 7 of the Essential Commodities Act and within my cognizance.

Thirdly, you accused Nos. 2 and 4 on the same date, time and place, forged certain documents, to wit, rationing cards, receipt books, stock registers etc., with intent to commit fraud i.e. to sale the above ration goods to the accused Nos. 1 and 2, and that you thereby committed an offence punishable u/s 465 read with S. 34 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried by me on the aforesaid charges.

Dated this the 2nd day of February 1988".

4. A perusal of the charge that has been framed will indicate that the entire charge proceeds on the footing that on 5-1-1987, the accused Nos. 1 and 2 were

apprehended by the police on Agra Road at which time, they were found in possession of 13 bags of wheat and 4 bags of rice. It is in respect of this particular commodity alone that the learned Judge has framed the first charge against accused Nos. 1 and 2. As far as the second charge is concerned, it is alleged that accused Nos. 3 and 4 had facilitated the wrongful removal and disposal of essential commodities i.e. the very same commodities that were seized by the police on 5-1-1987 at 7-30 p.m. The third charge also is very specifically linked up with the same incident and it deals with the consequent fabrication of certain records in relation to the subject matter of the goods that were seized by the police. It is the submission of Mr. Shah that the case that the accused was asked to meet was one that was limited and circumscribed to the facts and circumstances as set out in the charge that was framed. He has drawn my attention to the findings of the learned Judge which are at para 7 of the judgment. The learned Judge has very clearly recorded that it is not in dispute that wheat and rice were available in the open market and that wheat was deleted from Schedule No. 1 of the Maharashtra Food Grains Dealers Licensing Order, 1963 by the Government Notification dated 24-11-1986. Furthermore, the learned Judge has observed : "We have no evidence from the prosecution to come to the conclusion that the other 10 bags of wheat and 1 bag of rice were of fair price shop or issued by the Government from Government Godown". The learned Judge has, therefore, concluded that there is absolutely no evidence to conclude that the accused Nos. 1 and 2 contravened the provisions of the Maharashtra Scheduled Commodities (Regulation of Distribution) Order, 1975. In the light of these findings, it is the submission of Mr. Shah that as far as the ingredients of the charge that was framed are concerned, the learned Judge has very clearly acquitted all the accused and that, consequently, there is no warrant for the subsequent procedure adopted by the learned Judge in the judgment.

5. In para 8 of the judgment, the learned Judge has observed that on the same evening, when the police visited the fair price shop of the appellant and drew a panchanama, certain shortages were noticed by the police in respect of the stocks that ought to have been found there. It is the conclusion of the learned Judge that by virtue of these shortages that were noticed by the police from the shop of the original accused No. 4, it can reasonably be concluded that he had disposed of that material unlawfully and in the black-market. Mr. Shah has submitted that in the first instance, these facts were not the subject matter of the charge and secondly, a perusal of the evidence on record will indicate that the appellant had not been confronted with this aspect nor is there any admission on his part in the 313 statement recorded by the Court. Under these circumstances, it is the submission of Mr. Shah that the conviction of the present appellant would virtually amount to the accused having been convicted without even a proper charge having been framed and consequently, the conviction is vitiated and is liable to be set aside.

6. There is considerable substance in the submission advanced by Mr. Shah when Chapter 17 of the Code of Criminal Procedure and in particular, Sections 211,

212, 213 and 214 very clearly spell out the manner in which the charge is required to be framed in a criminal trial. It is basic that as far as the framing of a charge is concerned, not only should all material particulars be set out but, furthermore, the particulars as to time, place and person as also the provisions of law that are alleged to have been contravened must be spelt out in the charge. This is an essential requirement for the reason that in a criminal trial where the accused is required to enter upon his defence, and where the consequences to the accused person are serious in so far as an adverse verdict would result in the loss of his liberty, no allowance can be made in respect of a charge that may be found to be defective or wanting in material particulars. It is essential to point out that u/s 216 of the Code of Criminal Procedure, it is open to the Court at any subsequent state of the trial to alter the charge, to give the accused a fair opportunity of meeting that charge and to thereafter pronounce judgment. Under no circumstances, however, would a Court be justified in recording a finding against an accused person in respect of facts that do not form the subject matter of the charge.

7. Mr. Patil, the learned Public Prosecutor has sought to justify the procedure adopted by the learned Judge by submitting that if in the course of the trial, it came to the notice of the Court that on basis of a certain set of facts that emerge in evidence, offences under the very same sections of law have been committed, then, it would not be necessary for the trial Judge to frame a separate charge. This submission, however, is unacceptable for the reason that if such a procedure is to be sanctioned, not only would it be in breach of the specific provisions of Chapter XVII of the Code of Criminal Procedure, but it would result in miscarriage of justice in so far as the accused who is facing trial before the Court is concerned and who is required to enter his defence only to the charges that are framed against him, would be seriously handicapped and would also be prejudiced inasmuch as he would be taken totally unaware. There is no legal sanction for condoning the breach of the strict procedure that has been laid down in Chapter XVII of the Code of Criminal Procedure.

8. Chapter XVII of the Code of Criminal Procedure is quite explicit with regard to the principles relating to the constitution of a valid charge. S. 211 specifies the contents of charge generally, and lays down seven broad features that govern the basic structure of a valid charge viz., that the charge shall state the offence, the name or description of the offence or if the law does not specifically name the offence, so much of the definition as will give the accused notice of the charge with which he is charged, the law and the section of the law, the fact that the necessary legal conditions required by law to constitute the offence charged were fulfilled and further, that the charge shall be written in the language of the Court and that if the accused was previously convicted and is liable, by reason of such conviction, to enhanced punishment or to punishment of a different kind, the particulars of the previous offence. It is a further requirement as per S. 212 of the Code, that the particulars as to the time, place and person in respect of which the offence was committed be set out in a manner as reasonably sufficient

to give notice to the accused of the matter with which he is charged. Furthermore, in those of the cases where the nature of the offence is such that the particulars mentioned aforesaid do not give the accused sufficient notice of the matter with which he is charged, it is necessary that the charge should contain such particulars of manner in which the alleged offence was committed. These are statutory per-requisites which can neither be watered down nor bypassed because any defect in the charge would have serious repercussions on the validity of the trial. It is, however, true that u/s 216 of the Code, it is open to a court to alter or add to any charge and the natural consequences followed, that if the accused is prejudiced by any such alteration, that the Court shall, if necessary, follow the procedure prescribed in S. 217 of the Code by recalling the witnesses.

9. In addition to these mandatory requirements, S. 218 of the Code very clearly specifies that there shall be a separate charge for every distinct offence with which a person is charged and that an accused shall be tried separately in respect of every such charge. S. 218 of the Code prescribes the situation in which three offences of the same kind within a year may be charged together, and S. 220 further prescribes that at one trial, an accused may be tried for more than one offence with the series of acts so connected together to form the same transaction.

10. It is necessary to consider whether, in the light of the submissions advanced by Mr. Shah, the present trial is vitiated or whether, the non-framing of a charge in respect of the second and later incident is a mere irregularity or whether it is curable. In the first instance, it is a fundamental principle of criminal jurisprudence that the charge as framed must be proved. In the present case, the charge as framed confines itself to the first incident relating to the seizure and admittedly, on the finding of the learned trial Judge, this charge was not proved. It is only a logical consequence that on the basis of this charge, the learned Judge could not have held that some other offence stands proved. Conversely, having regard to the aforesaid provisions of the Code, before holding that the second set of facts established an offence, it was the primary duty of the trial Court to have framed a charge in respect of those offences and in the absence of a charge, the trial court could never have held the offences proved on the second set of facts.

11. It is unnecessary to elaborate on this aspect of the matter except to consider the effect of S. 464 of the Code which clearly specifies that such a finding or sentence of a Court shall not be set aside merely on the ground that a charge was not framed or that a charge was defective unless it has resulted in a failure of justice. In such a case, where failure of justice has in fact occasioned, the Court is empowered to order that a charge be framed and the trial be recommenced from the point immediately after the framing of the charge. The proviso to this Section, however, states that if in the opinion of the Court, the facts of the case are such that no valid charge could be framed against the

accused in respect of the facts proved, it shall quash the conviction. In *Kantilal Chandulal Mehta Vs. The State of Maharashtra and Another*, , the Supreme Court observed that there was a failure of justice due to the omission to frame a charge against the accused and that, consequently, the trial should be recommenced from that stage. On the other hand, the Delhi High Court in *Dal Chand @ Dalia Vs. The State*, , held that where an accused was charged for various offences, including u/s 302, IPC read with S. 149, but no specific and separate charge u/s 302 was made, but he was convicted under that Section, held that the accused had been prejudiced in his defence and, therefore, the conviction as well as sentence were set aside.

12. Applying these tests to the facts of the present case, there can be no manner of doubt that the non-framing of a charge in respect of the second set of circumstances has seriously prejudiced the accused, because he was neither afforded an opportunity to explain these circumstances as he could have done, nor was he able to put forward an adequate defence to that effect. It must, therefore, be held that there was a failure of justice and consequently, the conviction in respect of this set of facts would have to be quashed.

13. The last question that remains to be determined is as to whether this Court should direct that a charge be framed and that the trial could be re-commenced. This is a discretionary power vested in the Court for the obvious reason that with the passage of time, the change of circumstances and an overall consideration of the facts of the case, the Court would have to decide as to whether any useful purpose would be served by remanding the matter to the trial Court. One of the material considerations is a scrutiny of the record, which would indicate as to whether the set of facts present a degree of seriousness or whether they are of a trivial nature. An appeal Court would also be justified in evaluating as to whether in the overall circumstances of the case, those set of facts are likely to result in a conviction or whether such a situation is a remote possibility. I am of the view, that having regard to the investigation carried out and the record of this case and the fact that the charges are of a trivial nature, that no useful purpose would be served by remanding this case for a retrial consequently, I am not inclined to pass any such order.

14. In the result, the appeal is allowed. The conviction and sentence of the appellant are set aside. The fine, if paid, is directed to be refunded to the appellant.

15. Appeal allowed.