

(1950) 09 OHC CK 0007

In the Orissa High Court

Case No : Criminal Revision Ptn. No. 477 of 1949

Bansidhar Patnaik and Others

APPELLANT

Vs

Province of Orissa

RESPONDENT

Date of Decision : 29-09-1950

Acts Referred:

Criminal Law (Amendment) Act, 1932 — Section 10
Criminal Procedure Code, 1898 (CrPC) — Section 195
Penal Code, 1860 (IPC) — Section 145, 188

Citation : AIR 1951 Ori 84 : (1951) 17 CLT 80

Hon'ble Judges : Ray, C.J.;Narasimham, J

Bench : Division Bench

Advocate : V. Pasayat and R.N. Das, for the Appellant; A.G., for the Respondent

Judgement

Ray, C.J.—The petitioners seek review of the orders of the Court below convicting them under Sections 145 and 188, Penal Code, for having violated an order under Schedule 44, Criminal P. C., promulgated by the Magistrate and having failed to disperse the unlawful assembly after having been commanded to do so.

2. The petitioners' contention is that the prosecution under Schedule 88, Penal Code, is bad in law as no complaint was filed by the public authority concerned according to the provisions of Schedule 95, Criminal P. C. Secondly, that the trial, being bad in law as to Schedule 88, Penal Code, is bad in its entirety.

3. These contentions are sought to be met by the learned Advocate-General, appearing for the State, in two ways: (i) that the offence under Schedule 88, Penal Code, has been declared cognisable under Schedule 0, Criminal Law Amendment Act, 1932, and hence compliance with Section 195, Criminal P. C. is not necessary; and (ii) that even if the trial be bad with regard to offence u/s 188, it is not so with regard to the offence under Schedule 45, Penal Code. The latter is an independent offence. The prosecution therefore is not subject to prerequisite of complaint by the public authority concerned.

4. The effect of the Criminal Law Amendment Act, does not render the provisions of Schedule 95 nugatory nor is there any conflict between the two provisions in their essentialities. Cognisable offences are those in which the police may arrest without warrant. It has not been pointed out to us how this would obviate the necessity of a complaint by the public authority concerned. Arrest by the police does not necessarily amount to cognisance of an offence by the Magistrate. Section 195, Criminal P. C. inter. poses a barrier between commission of an offence and cognisance by the Magistrate. This barrier can be removed only by a complaint being filed before the Magistrate. It has been held in the case of AIR 1934 71 (Nagpur) :

"The (act that no proceedings may be instituted for an offence under Schedule 9 (f) of the Arms Act without the permission of the District Magistrate does not make the offence non-cognisable."

This contention, on behalf of the State, has found favour with the Court below. We hold that non-compliance with Schedule 95, Criminal P. C. is a fatal defect.

5. The next contention that remains to be considered is whether the conviction under Schedule 45, Penal Code, would stand. A large number of authorities has been cited on both sides in support of their respective contentions. In all the cases, it has generally been accepted that evasion of Schedule 95, Criminal P. C., should not ordinarily be allowed. The larger question whether where an accused is convicted in one trial of several offences, the trial of some of which is bad in law for the non-fulfilment of certain primary conditions, the entire trial shall be held invalidated for such non-fulfilment and the conviction set aside, need not be decided in this case. There are some decisions which would support the contention that even though the trial is bad in relation to one or more offences, the conviction for other offences could be maintained. In the case of *Guru Prosad Ram Gupta and Others Vs. Rameswar Marwari*, their Lordships of the Calcutta High Court, relying upon a Pull Bench decision of that Court reported in *Satis Chandra Chakrabarti Vs. Ram Dayal De*, held:

"Since the Legislature has not chosen to include Schedule 00, I. P. C. amongst those sections, in which the prosecution must be initiated by the Court, in connection with which the offence has been committed, there is no provision of law by which the Court can refuse to permit a prosecution under Schedule 00 where the facts appear to justify such a prosecution, on the ground that the proceedings have not been initiated under Schedule 76, Criminal P. C. by the Court before which the offence is alleged to have been committed and that the prosecution is designed to evade the provisions of Schedule 95, Criminal P. C."

6. In a Patna case, *Sheo Ahir and Others Vs. Emperor*, Noor J. sitting with Rowland J. held:

"If in course of one transaction, a number of offences are committed some requiring sanction for prosecution of some authority or the other, and others not requiring such sanction, it is not necessary that the prosecution of those offences

which do not require such sanction would depend upon the obtaining of the sanction for prosecution for those offences which required, such sanction. The law requires that for the prosecution of a number of offences sanction of the Court should be obtained; but it does not say if in course of commission of an offence which requires sanction for prosecution, other offences are committed, the magistracy or the police are helpless in proceeding to prosecute the offender for these offences, unless the Court sanctions the prosecution of the former."

7. Some support to this contention is also obtained from a decision of the Federal Court in the case of AIR 1939 43 (Federal Court). In this case, a public servant was tried jointly for offences under Sections 409 and 477A, Penal Code. Of the two, the latter offence was said to have been committed in course of discharge of his public duty and the prosecution for the offence necessitated, u/s 270, Government of India Act, 1935, previous consent or Sanction of the Government. Their Lordships of the Federal Court held, with regard to the order of acquittal of both the offences;

"If the prosecution is defective for want of proper consent, the proceedings would be void and hence the proper order to pass is that the complaint should be dismissed. Order directing acquittal is wrong."

8. Taking this view, their Lordships set aside the order of acquittal passed by the High Court and sent the case back to the Sessions Judge for rehearing the appeal against the conviction u/s 409 holding that the conviction under Schedule 77 A was, in any account, bad in law. They further observed that it was quite open to the learned Sessions Judge to grant the accused a retrial if he found "that the accused was prejudiced in his trial for the offence under Schedule 09 on account of his being jointly tried for the offence under Schedule 97 A without previous consent of the public authority concerned. This conveys to my mind that according to their Lordships the accused in that case could be tried only for the offence under Schedule 09, Penal Code, and the trial cannot be held to have been vitiated as a whole on account of the joinder with it, of the charge, in the same trial, under Schedule 77-A without the requisite consent, unless it caused prejudice to him in defending himself against the charge under Schedule 09.

9. I would, however, accept and adopt, with respect, the distinction between cases and cases as pointed out by Sir George Rankin C. J. in the case of Ibrahim v. Emperor 111 I. C. 432 (Cal.). I would quote the headnote of this case which summarises accurately the finding of his Lordship:

"Where the offence committed is really one under Schedule 71, Penal Code, it is illegal to reduce the charge to one under Schedule 74, Penal Code and prosecute the accused without a complaint under Schedule 76, Criminal P. C."

In course of argument, the Full Bench decision of the Calcutta High Court, already referred to, was relied upon for the contrary view. His Lordship said:

"It is said that in a Full Bench case reported as Satis Chandra v. Ram Dayal De

42 C. L. J. 94: 22 Cri L. J 31 F. B. the contrary of this doctrine was laid down. In that case, however, the view taken was that the offences defined in Sections 211 and 499 were fundamentally distinct in nature."

10. In the present case, however, the commission of offence under Schedule 88 is the common object of the unlawful assembly. Exclude Schedule 88 from the trial, and there would be no unlawful assembly and therefore the order for dispersal of such an assembly (not being an unlawful assembly) will have no legal validity. Without an unlawful assembly, an offence under Schedule 46, Penal Code, cannot be said to have been committed .

11. Under the circumstances, the trial for the offences, the facts constituting which are intimately, rather inextricably intertwined, is bad in law without a complaint in writing of the public authority concerned in relation to one of the offences charged.

12. In the result, the conviction and sentences are quashed. The rule is made absolute. The petitioners should, forthwith, be discharged from their bail bonds.

Narasimham, J.

13. I agree.