
(1945) 09 BOM CK 0003
In the Bombay High Court
Case No : Criminal Appeal No. 12 of 1944

Government of Bombay

APPELLANT

Vs

Abdul Wahab

RESPONDENT

Date of Decision : 17-09-1945

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 236, 403
Penal Code, 1860 (IPC) — Section 411A

Citation : AIR 1946 Bom 38 : (1945) 47 BOMLR 998

Hon'ble Judges : Rajadhyaksha, J; Lokur, J; Chagla, J

Bench : Full Bench

Judgement

Chagla, J.—This is an appeal by the Government of the Province of Bombay u/s 411A from an order of acquittal passed by Mr. Justice Divatia. The accused was tried on August 7, 1944, at the Criminal Sessions presided over by that learned Judge and he was charged as follows:

That you, on or about January 30, 1944, at Bombay, did commit murder by intentionally causing the death of one Balwantsing Mansing, and thereby committed an offence punishable u/s 302 of the Indian Penal Code and within the cognizance of the High Court.

The prosecution case was that on January 29, 1944, the accused in the company of one Chandraseker, a motor driver, went at night to Chembur. At Chembur in a hotel they found Balwantsing the deceased. It seems that Balwantsing, the accused and Chandraseker had a few drinks together and there was a quarrel between Balwantsing and the accused. The accused was assaulted and the result of his injuries was that his face became swollen. Next morning Chandraseker brought the accused back to Bombay. He was taken to the J. J. Hospital and his injuries were attended to. On the same day, that is, January 30, 1944, Chandraseker happened to be at Kalbadevi Road and he saw the accused coming from the direction of Pydhonie and going towards a urinal. He also saw Balwantsing standing on the opposite side of the road with four or five persons.

Then it seems that Balwantsing and these four or five persons crossed over and came to the place where the accused was, and a fight ensued. The result was that Balwantsing was stabbed and also the accused was stabbed on his leg. As a result of the injuries received Balwantsing died and the prosecution case was that the accused had stabbed Balwantsing and he was guilty of the offence of murder. At the trial the prosecution led the evidence of Chandraseker who deposed to the facts which I have just narrated. They also called Gulab, another motor driver, who saw the deceased and the accused lying on the road, both of them in a pool of blood. They further called one Mukundlal Pitambardas Shah who also deposed to seeing the deceased and the accused lying on the ground. Apart from the evidence of these three witnesses Chandraseker, Gulab and Mukundlal, the prosecution also led the evidence of Keshav Laxman Mane, police constable No. 1336/B, who deposed to the deceased having made a statement to him when he took the accused and the deceased to the hospital, and according to him the deceased told him that the accused had stabbed him. There was further the evidence of Sub-Inspector Mahomed Umarkhan who recorded the statement of the deceased at the hospital. In this statement the deceased also gave the name of the accused as his assailant though he stated that he did not know the reason why the accused had stabbed him. And finally there was the evidence of Rao Bahadur Ramchandra Santuram Asavle who recorded the dying declaration of the deceased in the presence of the accused, and the deceased identified the accused from among a few persons who were present there as his assailant. The medical evidence as to the injuries inflicted on the deceased was very clear. There were four stab wounds, and a superficial injury in the nature of an abrasion on the person of the deceased, and the most serious injury was an incised wound 3/4" X 3/4" on the left side at the level of seventh rib midaxillary omentum protruding out. It was found when the deceased was operated upon that spleen had been ruptured. The deceased expired on February 11, 1944, at 1045, and according to the doctor the cause of his death was pericarditis and pneumonia following stab wounds. According to him if two of the injuries which he had described had not been treated the patient would die as a result of haemorrhage.

2. Although the accused was only charged with murder, the learned Judge in his charge to the jury directed them that if they found on the facts that the lesser offence was committed they could bring in a verdict on the lesser offence, and he explained the law both in regard to culpable homicide not amounting to murder and to grievous hurt. The jury brought in a unanimous verdict of not guilty on the charge of murder and also on the charge of culpable homicide not amounting to murder, and they brought in a divided verdict of not guilty by six to three on the charge of grievous hurt. On this verdict the accused was acquitted of the charge of murder and culpable homicide not amounting to murder. With regard to the, verdict on the charge of grievous hurt, the learned Judge disagreed with the jury, but instead of discharging the jury he felt bound by a decision given by Mr. Justice Mirza in *Emperor v. Abul Kalam Azad* I.L.R (1931) Bom. 520:33 Bom. L.R.

349 and came to the conclusion that the accused could not be tried again on the charge of grievous hurt and therefore directed the accused to be acquitted and discharged.

3. From this order of Mr. Justice Divatia the Government of the Province of Bombay have appealed both on facts with leave obtained from the Court of Appeal and also on a question of law. It has been conceded by Mr. Munshi on behalf of the Crown, as indeed it was conceded by counsel for the prosecution before Mr. Justice Divatia, that there was no case on the charge of murder, but Mr. Munshi has pressed us to interfere with the verdict of the jury on the charge of culpable homicide not amounting to murder. It must be remembered that we are dealing with a unanimous verdict of not guilty arrived at by the jury on the charge of culpable homicide not amounting to murder, and the Court must always be reluctant to interfere with a verdict of the jury especially when it is a unanimous verdict. The Court must be satisfied that it is a perverse verdict, and the line of demarkation between a perverse verdict and an erroneous appreciation of evidence must be clearly and sharply drawn. The Court must be satisfied that no reasonable body of men could have arrived at the verdict at which the jury arrived. It is not sufficient that we reading the evidence might have come to a conclusion different from the one that the jury arrived at. We must "be satisfied that the only possible view on the evidence was the view that the accused was guilty and that the jury were manifestly perverse in the decision at which they arrived. We have carefully considered the evidence and in our opinion it is not possible to contend that in the circumstances of this case the verdict of the jury was manifestly perverse. Three or four considerations might be looked at. In the first place, the weapon with which the injuries were inflicted was not found, nor was there any evidence that the accused was carrying any weapon when the fight took place. Apart from the dying declaration and the statements made by the deceased to the two police officers to which I have referred, no witness was called before the jury who deposed to having actually seen the accused stabbing the deceased. Further, on the evidence it seems quite possible that it was Balwantsing and not the accused who was the aggressor. Balwantsing and his companions were seen on the opposite side of the road, the accused was going to the urinal on the other side, and it has been established on the evidence that the fight took place not on the side of the road on which Balwantsing and his companions were seen but on the side where the accused was proceeding on his way to the urinal. This seems to indicate that Balwantsing and his companions had crossed over and possibly they were the aggressors in the fight which ultimately ensued. Further, the line between culpable homicide not amounting to murder and grievous hurt is a very thin and subtle one. In the one case the injuries must be such as are likely to cause death ; in the other, the injuries must be such as endanger life; and it is difficult for us to say that on the medical evidence it was not possible for the jury to take the view that the accused was not guilty of culpable homicide not amounting to murder. As a matter of fact, as we have pointed out, the learned Judge himself directed the

jury that on the facts it was possible for them to come to a conclusion that the accused was guilty neither of murder nor of culpable homicide not amounting to murder, but only of grievous hurt. Under the circumstances we refuse to interfere with the unanimous verdict of not guilty arrived at by the jury on the charge of culpable homicide not amounting to murder.

4. The question of law that arises is whether the accused having been acquitted on the charge of murder he can be tried again for the lesser offence of grievous hurt or whether he is protected u/s 403 of the Criminal Procedure Code. It is urged on behalf of the accused that inasmuch as no specific charge was framed against him for grievous hurt and as he was charged only for murder, his acquittal on the charge of murder bars a fresh trial on the charge of grievous hurt. In order to appreciate this argument one must consider the scheme of the Criminal Procedure Code with regard to the framing of charges. Ordinarily an accused person must be specifically charged with every offence which he is alleged to have committed and the charge must be set out with sufficient particularity. That undoubtedly is the ordinary rule, namely that the accused cannot be convicted of any offence with which he is not charged. But to this ordinary rule there are two exceptions contained in Sections 237 and 238. u/s 236 of the Criminal Procedure Code, when the prosecution is doubtful as to what offence has been committed on certain facts being proved, it is open to them to charge the accused in the alternative or with additional charges with having committed offences which might be proved on the facts alleged by the prosecution. Section 237 then goes on to provide that even though the accused may not be charged u/s 236, if it appears in evidence that he committed a different offence for which he might have been charged under the provisions of Section 236, then he can be convicted of the offence. Section 238 provides that although an accused may not be charged with a minor offence he can still be convicted of it, and the necessary implication of Section 238 is that if the accused is acquitted of a major offence he is deemed to be acquitted of all the minor offences which are included in it, unless he is convicted u/s 238.

5. Now turning to the Sessions trial and the provisions of law as contained in the Criminal Procedure Code, the position is that u/s 299, Sub-section (3), it is the duty of the jury 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. Therefore, it is the function of the jury to find the facts, but as to the law applicable to those facts they must take the direction of the Judge and return the verdict accordingly. Therefore, if the Judge in his summing-up directs the jury that on a certain finding of facts they would be bound to return the verdict on a minor offence, it would be the duty of the jury to return such a verdict although the accused was not charged with the minor offence, Then u/s 305, Sub-section (3), of the Code, if the Judge disagrees with the majority of the jury, he shall at once discharge the jury. And under. Section 308, whenever the jury is discharged, the accused shall be detained in custody or on bail (as the case may be), and shall be tried by another jury unless the Judge considers that

he should not be retried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal. Therefore, it is clear, reading Section 305, Sub-section (3), and Section 308 together, that if the Judge disagrees with the majority of the jury and does not make an entry as provided by Section 308, the trial of the accused does not come to an end, but continues with another jury, and the trial of the accused by another jury is not a new or a fresh trial but a continuation of the same trial. We must point out with great respect to the learned Judge that technically the form of the order he made was incorrect. The order he made was: acquitting the accused, whereas what he should have done was to have discharged: the jury, and if he felt bound by the judgment of Mr. Justice Mirza, he should have made an entry against the charge as provided by Section 308 that in his opinion the accused should not be retried. | But in substance the effect is the same, namely that the accused has been acquitted by Mr. Justice Divatia.

6. Now turning to Section 403 which provides that 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. Now, in order that the accused can avail himself of the protection of Section 403, Sub-section (1), two conditions are necessary. There must be a conviction or an acquittal and there should be a new trial for the same offence or for an offence for which he might have been charged u/s 236 or might have been convicted u/s 237. It is true that in the case before us there is an acquittal of the accused on the charge of murder and this acquittal would undoubtedly protect the accused not only with regard to the charge of murder but on all minor offences included in that major offence from being tried again in a new trial. But as we have pointed out, in our opinion, a retrial resulting from the disagreement by the Judge with the jury u/s 305 and as provided by Section 308 is not a new trial as contemplated by Section 403, and therefore the order of acquittal on which Mr. Baptista relies on behalf of the accused does not give him the protection u/s 403 of not being liable to be tried again for that offence or for minor offences included in that major offence of murder.

7. Mr. Baptista's contention before us has been that Mr. Justice Divatia, if he took the view that on the facts disclosed it was open to the jury to bring in a verdict on a minor charge, should have framed additional charges u/s 227, Sub-section (1), of the Code, and according to him, inasmuch as the learned Judge failed to frame such additional charges and that there was no specific charge with regard to grievous hurt, the acquittal on the charge of murder should afford the accused protection u/s 403. Now, there is no obligation on the Court or on the Judge presiding over the Sessions to frame a specific charge with regard to a minor offence; the law so provides u/s 238, and therefore we do not see why there was any obligation upon the learned Judge to frame a specific charge with

regard to grievous hurt u/s 227 of the Criminal Procedure Code. The whole of Mr. Baptista's argument comes to this that if there had been a specific charge with regard to grievous hurt and the learned Judge had disagreed with the verdict of the jury and ordered a retrial, he could not have availed himself of Section 403, but inasmuch as there was no specific charge and the jury brought in a verdict on a minor offence without the accused being specifically charged therefor, therefore the accused is protected u/s 403. In our opinion, the position in law cannot possibly be altered by reason of the fact that there was no specific charge of the offence of grievous hurt and that the position is the same whether there was a specific charge or the accused was convicted on a minor charge under the provisions of Section 238 of the Criminal Procedure Code.

8. Turning now to the judgment of Mr. Justice Mirza in *Emperor v. Abul Kalam* I.L.R. (1931) Bom. 520: 33 Bom. L.R. 349, which has created the difficulty, in that case the accused was tried before Mr. Justice Kemp and a special jury on charges connected with the offence of robbery and murder. On the charge of murder there was a verdict of not guilty and the jury brought in a verdict of five to four on the offence of culpable homicide not amounting to murder. They also brought in a similar divided verdict on the charge connected with robbery ; and the learned Judge ordered the jury to be discharged and ordered a retrial. The accused was placed before Mr. Justice Mirza presiding over the Sessions, and it was urged on behalf of the accused that he was protected by Section 403 and he could not be tried on the charge of culpable homicide not amounting to murder he having been acquitted on the charge of murder. The learned Judge accepted that contention and in his judgment observed (p. 525):

In this case there were no specific charges before the jury of culpable homicide not amounting to murder and abetment of culpable homicide not amounting to murder. The jury were not bound to" return a verdict in respect of those offences unless they were of opinion that the accused could be held guilty of these offences instead of murder and abetment of murder. Had the specific charges been framed in the original trial, the jury would be bound to return a verdict on them.

With great respect to the learned Judge, he overlooked the provisions both of Section 299 and also of Section 238. The learned Judge did not consider that under the provisions of Section 299 it was the duty of the jury to bring in a verdict on the minor offence if they were so directed by the learned Judge on the evidence that was led before them. Further, the learned Judge has emphasised the absence of specific charges with regard to the offence of culpable homicide not amounting to murder. There again he did not take into consideration the provisions of Section 238 which enables the Court to convict an accused on a minor offence if he is charged with the major offence although no specific charge in regard to the latter is framed against him. We are of the opinion that the case decided by Mr. Justice Mirza was wrongly decided and that it is not good law.

9. Our attention has been drawn to a decision of the Calcutta High Court in

Emperor v. Nirmal Kanta Roy I.L.R (1914) Cal. 1072. In that case the accused was charged with the murder of a police-officer and also for murder and culpable homicide of another person. With regard to the murder of the police-officer the jury brought in a verdict of not guilty. With regard to the other person the jury brought in a verdict of not guilty on the charge of murder, but brought in a verdict of five to four on the charge of culpable homicide. The jury was discharged and the accused was put up before another jury. It was urged before Mr. Justice Stephen, the presiding Judge, that the case fell u/s 403. That argument was rejected by the learned Judge. The learned Judge was dealing there with a case where there was a specific charge with regard to the offence of culpable homicide, and the learned Judge goes on to observe (p. 1083):

If he had been charged with murder alone, no doubt a verdict of "not guilty" would protect him from another trial for culpable homicide; and should he be acquitted of culpable homicide he will be protected from a trial for any offence involving hurt: but where a charge was made, the case fell outside the provisions of the law dealing with cases where it might have been made.

Now, these observations of Mr. Justice Stephen have been strongly relied upon by Mr. Baptista and it seems also that these observations influenced Mr. Justice Mirza in arriving at the decision to which we have just referred. But Mr. Justice Stephen, was only dealing with two cases: one, where there is a specific charge and the jury brings in a divided verdict, and the other where there is only a charge for a major offence and the jury brings in a verdict of not guilty. It is perfectly true that in the latter case when the accused is charged with murder and the jury brings in a verdict of not guilty he cannot be tried again for a minor offence. But the learned Judge was not dealing with the case which we have before us where not only the accused was charged with a major offence but on the direction of the learned Judge the jury actually brought in a verdict on the minor charge which it was possible for them to do u/s 238. Therefore, the observations of the learned Judge in this case are restricted to the two cases which he was contemplating. We may draw attention to the other observations of this learned Judge which are very pertinent and which are reported at the foot of p. 1083:

Also for the purposes of Section 403, I do not consider that the accused is being "tried again". He is being tried on the original indictment, and I consider that he is being tried on his first plea of "not guilty." The duty of the Court is to continue the trial of the accused before another jury; and the process may continue till a verdict is passed on all the counts without the accused being "tried again" u/s 403. I am aware that Section 308 refers to the accused being "retried", but this does not affect the construction of Section 403.

Similarly here it is the duty of the Court to continue the trial of the accused before another jury if the learned Judge disagrees with the majority verdict of the jury, and the trial does not come to an end till the final verdict is given and accepted by the learned Judge.

10. Finally we were referred to a judgment of the Madras High Court in *In re Arumugham* A.I.R [1943] Mad. 737. In that case the accused was first charged for the offence of murder and the jury brought in a verdict of not guilty by a majority of six to three. He was ordered to be retried. At the second trial the jury brought in a verdict of not guilty on the charge of murder, but brought in a verdict of guilty on the charge of causing grievous hurt by five to four. The learned Judge directed that he should be re-tried on the charge of grievous hurt. Before Mr. Justice King, when the accused was put up for his trial, objection was taken to the maintainability of the trial in view of the provisions of Section 403, and the learned Judge sustained the objection and ordered the accused to be acquitted. In his judgment the learned Judge came to the conclusion that the offence of grievous hurt was covered by Section 237 and was not a minor offence within the meaning of Section 238, and he took the view that as Section 403 afforded a protection for offences in respect of which the accused could have been charged u/s 237, the objection raised by the accused to the trial must prevail. Now, with great respect to the learned Judge, he did not at all consider the question whether, when the accused was being retried the learned Judge having disagreed with the majority verdict, it was a new trial within the meaning of Section 403 of the Criminal Procedure Code. Nor do we appreciate or agree with the reasoning of the learned Judge as to the distinction between Section 237 and Section 238. The learned Judge seems to take the view that Section 403 only affords protection against the accused being tried for the same offence or for offences with which he might have been charged u/s 237, but the section affords no protection against a new trial in respect of a minor offence u/s 238. As we have pointed out, minor offences are included in the major offence, and if the accused is sought to be tried at a new trial on a minor offence when he has been acquitted on a major offence, he would be tried for the same offence as provided by Section 403 and the new trial would be barred u/s 403. Therefore the protection given u/s 403 does not merely apply to cases falling u/s 237, but also to cases falling u/s 238.

11. In the case before us Mr. Justice Divatia disagreed with the jury and he was not of the opinion that the accused should not be retried u/s 308. The only reason why the learned Judge passed the order of acquittal was because he felt he was bound by the decision of Mr. Justice Mirza. That was the only impediment which came in the way of his ordering a retrial. Now that we have held that the judgment of Mr. Justice Mirza was wrong, the result must follow that the learned Judge having disagreed with the verdict of the jury u/s 308, there must be a retrial of the accused. We therefore direct that the accused should be tried u/s 326 at the current Sessions.

Lokur, J.

12. I agree and have nothing to add.

Rajadhyakshaf, J.

13. I agree and have nothing to add.