

(1954) 09 BOM CK 0012

In the Bombay High Court

Case No : Criminal Application No. 820 of 1954

Jaswantray Manilal Akhaney

APPELLANT

Vs

State of Bombay

RESPONDENT

Date of Decision : 10-09-1954

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 104, 236, 237, 403, 403(1)
Hoarding and Profiteering Prevention Ordinance, 1943 — Section 13(1), 5
Insurance Act, 1938 — Section 107, 107(1), 28, 41(2)
Penal Code, 1860 (IPC) — Section 409, 466

Citation : AIR 1955 Bom 259 : (1955) 57 BOMLR 55 : (1955) CriLJ 1049 :
(1955) ILR (Bom) 54

Hon'ble Judges : Vyas, J;Dixit, J

Bench : Division Bench

Advocate : B.H. Lulla, S.N.B. Lulla and M.R. Lulla, for the Appellant; S.C. Patwardhan and D.P. Sethna, S.R. Vakil, Attorneys to Central Govt. and H.M. Choksi, Govt. Pleader, for the Respondent

Judgement

Dixit, J.—This criminal application raises a question u/s 403(1) of the Code of Criminal Procedure. In order to appreciate the question raised, it is necessary to mention facts relevant to the determination of the question.

2. The applicant was a director of an insurance company which will, for brevity's sake, be called the "Union Life Insurance Company." On March 31, 1949, the applicant made a return, as required by Section 28 of the Insurance Act, 1938. It appears that an administrator took charge of the affairs of this company, he having been appointed by the Central Government. If the return made is a false return, the consequence is to be found in Section 104 of the Act, which provides that "whoever, in any return, report, certificate, balance-sheet or other document, required by or for the purposes of any of the provisions of this Act, wilfully makes a statement false in any material particular, knowing it to be false, shall be punishable" as mentioned in that section. There was a recommendation made that the applicant should be prosecuted u/s 104.

Now, in the case of a prosecution by or at the instance of the Controller, no sanction of the Advocate-General is necessary. But where the proceedings are to be started not at the instance of the Controller but at the instance of an administrator, then Section 107 (1), so far as material, provides that;

"Except where proceedings are instituted by the Controller no proceedings under this Act against an insurer or any director, manager or other officer of an insurer or any person who is liable under Sub-section (2) of Section 41 shall be instituted by any person unless he has previous thereto obtained the sanction of the Advocate-General of the State where the principal place of business in the States of such insurer is situate to the institution of such proceedings....."

3. Inasmuch as the proceedings were to be started by the administrator, sanction of the Advocate -General was applied for and was obtained on May 23, 1951, and pursuant to this sanction, a complaint was filed against the applicant on May 26, 1951, u/s 104. That case was tried by Mr. M. J. Gordhandas presiding over the 19th Court, Bombay, and on March 12, 1953, the learned Magistrate made an order in favour of the applicant holding that the applicant was entitled to an acquittal principally and upon the only ground that the sanction for the prosecution of the applicant was bad in law.

4. Thereafter the administrator applied for fresh sanction and the Advocate-General having given such a sanction, a fresh complaint was filed against the applicant u/s 104, & the contention taken on his behalf in the Court below was that having regard to Section 403(1) of the Criminal Procedure Code, a second prosecution could not go on against the applicant. That plea was repelled by the learned Magistrate who considered that the plea had no substance and in the end he held that the accused was not entitled to the protection afforded by Section 403 of the Criminal Procedure Code. It is the correctness of this order which Mr. Lulla for the applicant has challenged in this revisional application. The contention taken on behalf of the applicant is that, inasmuch as there was an order of acquittal in favour of the applicant by a judgment dated 12-3-1953, the applicant cannot be prosecuted a second time for the same offence viz. u/s 104.

5. Section 403(1) 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, the principle underlying Section 403 is clear and cannot admit of any doubt or difficulty. Shortly stated, the principle is that a person once convicted or acquitted cannot be tried for the same offence. The idea underlying the principle is that a person can be prosecuted only once in respect of a particular offence and when that prosecution ends either in the conviction or in the acquittal of an

accused person, it must receive a finality as all proceedings must.

Mr. Lulla contends that in this case inasmuch as there is a finding in his favour which is one of acquittal, a second prosecution is nothing but an harassment to his client and the principle of Section 403 (1) must obviously apply: In support of this contention he relies upon a decision of their Lordships of the Privy Council reported in -- AIR 1949 264 (Privy Council) . Incidentally, it may be mentioned that -- "Yusof-alli's case (A)" is a case which went on appeal to their Lordships of the Privy Council from a decision of this Court reported in -- "Emperor v. Yusofalli Noorbhai", AIR 1948 Bom 153. Now, -- "Yusofalli's case (A)" was one which arose under the Hoarding and Profiteering Prevention Ordinance, 1943.

The appellant before their Lordships of the Privy Council was charged in the Court of the Presidency Magistrate, 6th additional Court, u/s 13(1) read with Section 5 of the Ordinance and the offence alleged against the appellant was one of hoarding. The trial of the appellant ended in the acquittal of the appellant before the learned Magistrate. It is to be noted that the Government of Bombay did not appeal against the order of the learned Magistrate acquitting the appellant, but it appears that on 10-4-1946, a fresh sanction to prosecute the appellant was obtained from the Government of Bombay, and on April 13, a fresh prosecution was instituted against the appellant for the same offence and on the same facts as in the former prosecution.

On 16-9-1946, the learned Magistrate acquitted the appellant, relying upon Section 403, and then the Government of Bombay appealed from the order of acquittal and this Court by its judgment reversed the order of acquittal made by the learned trial Magistrate and directed that the prosecution should go on as against the appellant. From the order made by the High Court the accused-appellant went to the Privy Council and the Privy Council had to consider the effect of Section 403.

A part of the head-note of that case runs as follows:

"Where a person charged with an offence punishable under the Hoarding and Profiteering Prevention Ordinance, 1943, is acquitted on the ground that his trial was invalid for want of a proper sanction under Clause 14 of the Ordinance, he can be tried again for the same offence, after a valid sanction is obtained, for Section 403 of the Criminal Procedure Code, 1898, has no application to such a case."

6. Now, the facts of that case are clear. The learned trial Magistrate acquitted the appellant because of a previous order of acquittal made by the Magistrate, having regard to Section 403. The High Court, upon appeal, reversed the decision of the learned trial Magistrate and held that a second prosecution could be instituted against the appellant and the Privy Council confirmed the order made by the High Court. It is obvious that the actual decision is against the contention raised by Mr. Lulla on behalf of the applicant. Now, there was an order of acquittal made by the learned trial Magistrate and it was this order which was

set aside by the High Court and which was confirmed by the Privy Council, notwithstanding Section 403. If, therefore, Mr. Lulla's argument is based upon the decision of their Lordships of the Privy Council in -- "Yusofalli's case (A)", there is no substance in this contention.

But Mr. Lulla argues that in the Privy Council case a contention was raised on behalf of the appellant and that contention was that the learned Magistrate should have adjudicated upon the validity of the sanction but had not so adjudicated upon the validity of the sanction. This contention is to be found at pp. 266-267 of the report. Now, I have read the judgment in vain to find out whether the Privy Council have given their opinion upon this contention and Mr. Lulla concedes --and I think very properly -- that the Privy Council have not decided this contention. It is clear, therefore, that there is no decision in favour of Mr. Lulla's contention and in regard to the contention raised there is no observation or "dicta" of the Privy Council to support the contention of Mr. Lulla.

Therefore, Mr. Lulla was driven to the position that although the actual Privy Council decision was not in his favour and although there was no "dicta" or observation in his favour, the Privy Council have left the question open. If the Privy Council have left the question open, it seems to me that there is no decision in his favour. In my view, therefore, there is no decision which supports Mr. Lulla's contention that there should not be a second prosecution in this case instituted against the applicant.

7. But Mr. Lulla says that if one has regard to what happened in the Court of the Presidency Magistrate, 19th Court, it will be clear that there was a valid sanction and it was wrong of the learned Magistrate of the 19th Court to hold that the sanction was invalid. Now, a reference to the judgment of the learned Magistrate of the 19th Court shows that the sanction given by the Advocate-General was in the following terms:

"I have received your letter of the 1-5-1951 and on perusal of the contents, I hereby grant you sanction u/s 107, Insurance Act to institute proceedings against the persons responsible for the offence u/s 104 of the same Act."

It was this sanction which was produced to support the prosecution u/s 104 in the former proceeding. With respect to this sanction, the learned Magistrate said:

"The wording in the sanction shows that proceedings were to be instituted against persons responsible for the offence u/s 104 of the same Act. Therefore, the sanctioning authority authorised Mr. G. N. Pradhan, the administrator, to select according to his own discretion persons who have to be proceeded against. It was the function of the sanctioning authority and not of Mr. Pradhan. The sanction, therefore, is bad in law."

It is, therefore, clear that the former prosecution failed and the applicant was acquitted because the sanction which was a condition precedent to the prosecution of the accused-applicant was bad in law. Now, Mr. Lulla says that we

should go into the question about the validity or otherwise of the sanction given by the Advocate-General in the former proceeding. Speaking with considerable hesitation but quite frankly, I could not appreciate the point raised by Mr. Lulla. Upon the materials placed before the Presidency Magistrate, he came to the conclusion that the sanction was invalid and what Mr. Lulla is trying to do is to ask us that we should ourselves find whether or not that view was right. In the first place, we are not hearing an appeal from the order made by the Presidency Magistrate. In so far as the learned Magistrate took the view that the sanction was invalid, it was a final view of his which resulted in the acquittal of the applicant, and it seems to me that in the absence of ""dicta"" to support the contention of Mr. Lulla, we are not prepared to agree with Mr. Lulla that we should go into the question about the validity or otherwise of the sanction given by the Advocate-General in the Conner proceeding. To repeat once again, in the first" place, we are not hearing an appeal from that order, and in the second place, we cannot now consider the materials upon which that view was based. It seems to me, therefore, that the view which was taken by Mr. Gordhandas was final and the basis of the decision was that in the absence of a valid sanction the prosecution must fail and the prosecution tailed and it ended in the acquittal of the applicant.

8. J Mr. Lulla then contends that even if Section 403 does not apply, the principle of Section 403 should be applied to this case and in this connection he relies upon a decision of this Court reported in - "Emperor v. Anant Narayan", AIR 1945 Bom 413. It is quite true that although Section 403 may not, in terms, apply to the facts of a particular case, , the principle of Section 403 may be applied to the facts of that particular case. But the case upon which Mr, Lulla relies is clearly distinguishable. There was in that case no question of any sanction to support the prosecution. What happened was that the accused in that case who was a Kulkarni had misappropriated a certain amount belonging to Government which he later on paid. He was then charged with offences punishable under Sections 409 and 466, Penal Code, in respect of two items out of the amount misappropriated by him and the trial was held before a Sessions Judge who agreed with the unanimous verdict of the jury and acquitted the accused.

There was then a fresh trial in respect of certain other items of the amount misappropriated by the accused and what this Court held was that although the plea of "autrefois acquit" u/s 403 was not technically available to the accused, the principle of it was available to him in the interests of justice. Now, in the present case the applicant was prosecuted for an offence u/s 104 and in view of the invalid sanction to support that prosecution, he was acquitted. Now, a valid sanction has been accorded and the accused is being prosecuted. In these circumstances, I find no analogy between -- "Anant Narayan"s case (C)" and the present case.

In my view, therefore, the principle of Section 403 cannot, in the interest of

justice, be applied to the facts of this case. Mr. Lulla then raised the question that the learned Magistrate has recorded certain findings in connection with the offence which the accused had been charged with and he says that in view of those findings the learned Magistrate who will now deal with the case u/s 104 may be prejudiced, having regard to those findings. Obviously, the learned Magistrate who will deal with the present case will have to decide the case in accordance with the evidence as will be led in the case. But Mr. Lulla says that Magistrates are human as all men in the world are human and he will be unknowingly influenced by what has been recorded against the applicant in the former case. If a Magistrate is human, nobody can and, need find fault with him. But in so far as the Magistrate will not decide the case in accordance with the evidence which will be led, one may have to find fault with him, but that stage has not yet arrived and the contention is, in my view, premature.

9. Then Mr. Lulla contends that once the Advocate-General has accorded a sanction in the former proceeding, he cannot give a sanction a second time to support the prosecution u/s 104. It seems to me that this is an entirely futile contention. There is nothing in Section 107 to support this contention." If the Advocate-General made a mistake in not according a proper sanction to support the first prosecution, I fail to see why he should not be able to give a proper sanction to support a second prosecution. If it is human to be influenced by the findings of a Magistrate, it is, I think, equally human to make a mistake, and, if the Advocate-General made a mistake in the first instance, there is no reason why he should not rectify the mistake and give a proper sanction to support the present prosecution.

10. I think, the true view is that if a Court has jurisdiction to try an accused person in respect of a particular offence and the Court makes an order of acquittal in his favour, the order of acquittal, even if wrong, will bar a second prosecution for the same offence and Section 403 will apply. If, however, the Court has no jurisdiction to try the accused in respect of a particular offence and it makes an order of acquittal, the acquittal cannot bar a second prosecution and Section 403 will not apply. In the present case, the order of acquittal made in the former proceeding was based upon the view that the sanction to support the prosecution was bad in law. It is obvious that we cannot now examine the correctness or otherwise of that view. The existence of a valid sanction being a condition precedent to the existence of jurisdiction, the case is, therefore, one of want of jurisdiction and the order of acquittal is void and is of no effect. In such a case Section 403 cannot apply.

11. For all these reasons, we think the view taken by the learned Magistrate is right. The application, therefore, fails and the rule will be discharged.

12. Application dismissed.