

(1965) 12 GUJ CK 0006

In the Gujarat High Court

Case No : Criminal Appeal No's. 417 and 488 of 1965

Koli Raja Sarwan and Another

APPELLANT

Vs

The State of Gujarat

RESPONDENT

Date of Decision : 01-12-1965

Acts Referred:

Bombay Municipal Boroughs Act, 1925 — Section 159, 160

Criminal Procedure Code, 1898 (CrPC) — Section 233, 234, 235, 236, 239

Evidence Act, 1872 — Section 167, 33

Penal Code, 1860 (IPC) — Section 302, 34, 406, 408

Citation : AIR 1966 Guj 239 : (1966) CriLJ 1128 : (1966) 7 GLR 544

Hon'ble Judges : Akbar S. Sarela, J

Bench : Single Bench

Advocate : D.C. Trivedi and R.K. Abhichandani, for the Appellant; B.R. Shah, Asst. Govt. Pleader, for the Respondent

Final Decision : Partly Allowed

Judgement

1. The appellants in these two appeals were accused Nos. 1 and 2 respectively in Sessions Case No. 4/65 in the Court of the Additional Sessions Judge, Porbandar at Junagadh. On trial before that Court they have been convicted by the learned Additional Sessions Judge, of an offence u/s 406 read with Section 34 I. P. C. in respect of an alleged misappropriation of two sums of money one of Rs. 2700 and the other of Rs 466.62 in all Rs. 3166.62. committed in the year 1959. For that offence each of them has been sentenced to rigorous imprisonment for 2 years and a fine of Rs 1000A in default of payment of which to undergo further rigorous imprisonment for six months. There was a separate conviction recorded against accused No 1 also for an offence u/s 406 I. P. C. in respect of the sum of Rs 2700 A and a separate conviction recorded against accused No. 2 u/s 408 I. P. C. for the sum of Rs 466.62 but no separate sentences in respect of those convictions were imposed.

2. The material facts are these: Accused No. 2 Bhikha Kachra was the Secretary of the Kukasvada Group Multipurpose Co-operative Society continuously from

August 1958 to July 1963 and accused No 1 Raja Sarwan was the President of that Society from July 1957 to July 1963 except for the period March 1968 to July 1962. As the Secretary accused No. 2 had to maintain accounts, documents and vouchers and was under the Rye-laws entitled to receive payments of money and to incur necessary expenses. As the President of the Society accused No. 1 was in custody of the cash of the Society and had to receive cash and deposit it into the bank as also to supervise the work of accused No. 2. The auditor of the Cooperative Department one Mr. Jayantilal Kothari visited Kukasvada in the course of his duties and inspected and audited the accounts of this Society from 26 6 1963 to 30-6-1963. On such inspection he noticed misappropriation of an amount of more than Rs, 35000/- during the period from 1959 to 1963. The misappropriation substantially consisted of failure to credit the payments made by the debtors to the Society in respect of which payments, kachha receipts had been issued to the said debtors. He also found that accused No. 1 was not able to produce the balance of the general cash book amounting to Rs 1541.39 and accused No 2 was not able to produce the cash balance of the Society's shop amounting to Rs. 1551.98. On the basis of his inquiry and report, a complaint was filed before the police. Investigation started and the accused were prosecuted.

3. Five charge-sheets were sent up against these two accused one for each of the years 1959, 1960, 1961, 1962 and 1963. Five Sessions trials were held on the basis of the committal orders made in respect of the five charge-sheets The Sessions Case No 4 of 1965 related to the alleged misappropriation in the year 1959. The present appeals (Criminal Appeals Nos. 417/65 and 488/65) arise from the conviction recorded and sentence passed in that case. The Sessions Cases Nos. 5, 6, 7 and 8 of 1965 related to the alleged misappropriation in the years 1960, 1961, 1962 and 1963 respectively. In those cases also the convictions have been recorded and there are separate appeals filed against those convictions Those appeals have also come up for hearing before this Court along with the present appeals

4. At the outset, a preliminary objection was raised before me on behalf of the appellants. It related to the procedure adopted by the Sessions Court during the trial of these five cases. It appears that most of the material evidence was recorded in Sessions Case No. 4/65 and then by the consent of the learned Public Prosecutor and the learned advocates of the two accused, copies of that evidence oral and documentary were placed in the record of the other four cases and treated as part of the evidence recorded in those cases. No doubt some other evidence was also led in the other four cases but the evidence relating to the capacity in which the two accused had worked with respect to the Society, the evidence relating to their duties and responsibilities, the evidence in respect of the maintenance of accounts and absence of credit in respect of the payments made, the evidence in respect of the falsification of accounts, documents and vouchers in July 1963 when the embezzlement was discovered and the general evidence relating to the working of the Society, was all led in Sessions case No.

4/65 and copies of that evidence were placed on the record of each of the other Sessions Cases as part of the evidence of each of those cases. The learned advocates of the appellants contended that this is an Illegality and it is not cured by Section 537 of the Criminal Procedure Code. They further contend that the convictions of all the five cases must therefore be set aside and a re-trial ordered. They submit that even in respect of Sessions Case No. 4/66 where the whole evidence for that case is actually recorded, It is but proper that the convictions be set aside and a re-trial ordered.

5. There is no doubt that the procedure adopted by the learned Sessions Judge was Illegal. Section 233 of the Criminal Procedure Code provides that for every distinct offence of which any person is accused, there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in Sections 284, 235, 236 and 239 of the Code. Therefore, these five cases could not have been tried together unless they could be brought within the ambit of any of the Sections 234, 235, 236 and 239 of the Criminal Procedure Code. The learned Assistant Government Pleader concedes that they cannot be so brought. The cases therefore were correctly separately committed. Now after the commitment when the learned Additional Sessions Judge was ready to hear the cases, the procedure to be followed as laid down in Section 286, Criminal Procedure Code, was that the prosecution was to open its case and then to examine its witnesses. Section 288 of the Code permits the evidence of a witness recorded in an inquiry under Chapter XVIII of the Code, to be treated as evidence in that case before the Sessions Court If such witness is produced and examined. Sections 289 and 290 of the Code provide that after the examination of witnesses for the prosecution is concluded and the accused has been examined by the Court the accused is entitled to examine his witnesses, if any. Thereafter follow the provisions relating to the submission of arguments and the delivery of the judgment by the Judge. Therefore the evidence on which the learned Sessions Judge proceeds to deliver the judgment must be the evidence recorded in the trial. The Code does not appear to contemplate a trial on evidence which is not recorded in that trial. It may be that a witness earlier examined in a proceeding between the parties, is dead or is not available though living for any of the reasons set out in Section 33 of the Indian Evidence Act. In such a case, it is permissible to have his evidence given in the earlier proceeding brought on record as evidence at the subsequent proceeding. If the conditions laid down in that section are satisfied. Now, in the present case, It is not the prosecution case that Section 33 of the Indian Evidence Act was attracted or that the learned Judge purported to act under that section. In fact there is no order of the Judge in the record. In the body of the judgment, the learned Judge merely refers to the consent of the three learned advocates (meaning the public prosecutor and the two defence advocates) to treat some of the evidence recorded in Sessions Case No. 4/65 as evidence in the other cases. After referring to the witnesses whose evidence he proposed to treat as common to the other Sessions Cases--there are 20 such witnesses--the learned Judge states

that the exhibit numbers of the documents, proved in the testimonies of those witnesses, have been given in Sessions Case No. 4/65 and that the discussion of the evidence of those witnesses and those documents and the inferences to be drawn therefrom is to be treated as common in all five Sessions Cases. This is the only reference for taking the evidence recorded in one case on record in other cases. There is no mention by the learned Judge under what provisions of law he has taken the evidence of those witnesses and the documents produced through them as part of the evidence recorded at the trial of the other four Sessions Cases. The consent of the three advocates which is the only fact referred to by the learned Judge in support of the procedure adopted by him, cannot justify the non-observance of the provisions of law relating to the manner of a criminal trial. Some of these witnesses are very material witnesses and one of them is a witness who proves the alleged confession made by accused No. 2. It is clear on these facts that the learned Judge committed an illegality in the procedure adopted by him in so far as it related to the trial of Sessions Cases Nos. 5, 6, 7 and 8 of 1905

6. Now the infringement of these provisions of law in respect of the trial of the Sessions Cases Nos. 5, 6, 7 and 8 was infringement of the provisions relating to the mode of trial. Such an infringement is not curable u/s 537 of the Criminal Procedure Code. Clause (a) of that section which is relevant provides that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered under Chap. XXVII or on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code. An irregularity which can be cured under this provision is an irregularity in the conduct of the trial. Where the procedure laid down by the Code has been followed but has not been wholly followed, the irregularity would be curable under this provision, but not where the procedure laid down in the Code is wholly departed from as in this case. This position has not been disputed by the learned Assistant Government Pleader. Therefore it would be enough to refer to the observation made by the Privy Council in *Pulukuri Kotayya v. Emperor* AIR 1947 PC 67. Their Lordships say:

"When a trial is conducted in a manner different from that prescribed by the Code the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured u/s 537 and nonetheless so because the Irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code."

This statement of the law has been affirmed by the Supreme Court in *Payare Lal Vs. State of Punjab*, .

7. Now turning to the authorities to which my attention has been invited, the case of *Emperor v. Champaklal* AIR 1941 Bom 166 may first be noticed. In that

case 15 cases were filed before the Magistrate against the accused for breach of the provisions of the Bombay Municipal Boroughs Act, 1926, 9 cases being of breach of Section 169 and 6 cases of breach of Section 160 of that Act. The evidence was recorded in one of those cases by the Magistrate. This was done at the suggestion of the defence pleader. The case ended in conviction. In the other case consequential orders were made on the basis of the evidence recorded in the first case. The learned Judges of the Bombay High Court said:

"Criminal cases cannot like civil suits be consolidated and tried together on the same evidence except within the limits as to the joinder of charges laid down in the Criminal Procedure Code -

"In the present case it appears that the defence pleader suggested the adoption of this procedure. That makes no difference, it is plain therefore that the conviction of the accused in all the cases in which no evidence was recorded, that is the cases which are the subject of references Nos. 99 to 112 of 1940, must be set aside and the fines and process fees ordered to be paid must be refunded to the accused."

8. The next case that may be noticed is the decision of the Lahore High Court in *Allu v. Emperor* AIR 1924 Lah 104. There were cross-cases between the parties. The accused in one case were the prosecution witnesses in the other. At the request of the accused in both the cases, the learned Sessions Judge treated the evidence of the prosecution witnesses in one case as evidence of the accused in the other case, in appeal against conviction, the High Court said:

"Moreover, the only way in which the evidence could legally be given, assuming the witnesses to be competent would be to put "each witness in the box and examine him orally at the close of the prosecution case. This, needless to say, was not done. What was in fact done was to take the written record of the prosecution evidence in *Hasta's* case and treat it without further formality as evidence for the defence in *Allu's* case after both cases had been concluded."

The learned Judges said that such a method of recording evidence was hopelessly and entirely illegal. It was contended before them that this defect was curable u/s 587 of the Criminal Procedure Code but they negatived that contention and held that Section 587 of the Code does not apply to any infringement of statutory requirements. It only applies to errors, omissions and irregularities of a technical nature which may occur by accident or oversight in the course of proceedings conducted in the mode prescribed by statute. A similar point arose before the Oudh High Court in *Bent Madho v. Emperor* AIR 1941 Oudh 20 where there were two cross-complaints and the evidence of some of the witnesses examined in one of those cases was considered in the other case also. It was held that the use of evidence which is not part of the record is not merely an irregularity curable by Section 587, Criminal Procedure Code but an illegality. A similar situation was considered by the Calcutta High Court in *Mrs. W. Waugh Vs. Emperor*, and the same view was taken. It is now appropriate to refer to a

Supreme Court decision to which my attention has been invited. In *Banwari Vs. State of Uttar Pradesh*, there were three separate commitments and trials for an offence u/s 302 read with Section 34, I. P. C against the same accused and the offences were committed on the same day in the course of the same transaction. The learned Sessions Judge conducted three separate trials on the basis of three commitment orders but recorded evidence in one case only and that evidence was considered in the other two cases for recording conviction in those cases. The Supreme Court said:

"The procedure of recording evidence with respect to the offences which were the subject of different Sessions Trials in the proceedings of one Sessions Trial alone, is not certainly warranted by the provisions of the Code of Criminal Procedure. Every separate trial must proceed separately, with the result that every proceeding, including the recording of evidence, in each trial should be separate."

In that case, however, the Supreme Court stated that as all the three cases could have been tried together under Sections 234 and 239. Criminal Procedure Code, it would be permissible to hold that all the three trials were in fact one trial as permissible under the Code and that therefore the procedure adopted would not vitiate the trial in the absence of prejudice caused to the accused. These decisions therefore go to show that where a joint trial is not permissible under Sections 234, 235, 236 and 239 of the Criminal Procedure Code if evidence not recorded at a trial of a case but recorded in some other case, is considered, the procedure followed is illegal and "not curable u/s 537 of the Criminal Procedure Code and a conviction resulting from a consideration of such evidence cannot be sustained."

9. The learned Assistant Government Pleader invited my attention to the decision of the Bombay High Court in *Emperor v. Har-jivan Valji* AIR 1926 Bom 281 . That was a case where the accused was alleged to have committed a breach of the octroi law of the Municipality. Three cases were filed against him in respect of that breach. All the three cases were tried together by consent of the pleader both for the Crown and the accused, and the evidence in one case was admitted as evidence in the other two cases. Before the High Court it was urged that this procedure was contrary to law and the convictions be quashed. On a report being called for, the Magistrate stated that the depositions recorded in one case were read out in the other two cases. Fawcett, J. who delivered the judgment of the Court observed that the procedure was no doubt irregular, but that having regard to the report of the Magistrate the court was not constrained to hold that it constitutes an illegality which vitiates the trial of the other two cases. The court took the view that the defect was curable by Section 537, Cri. P. C., as no prejudice was caused to the accused. That case was, therefore, different from the cases earlier discussed. The depositions of the witnesses having been read out in the other two cases, presumably to the witnesses themselves, those witnesses can be said to have been examined in those cases and their evidence

recorded. The defect lay in the method of examination and not in introducing evidence which had not been adduced in the case. The other case to which my attention has been invited by the learned Assistant Government Pleader is the Privy Council case in AIR 1927 26 (Privy Council) . In that case there were two cross cases. the trial was held separately and in each case there was a body of separate evidence The irregularity lay in the fact that the High Court while considering the cases of the two accused which had been separately tried, delivered a common Judgment. The Privy Council stated that although the method so adopted is likely to lend to considerations being imported from one case to another and it might have been better to keep -the evidence entirely distinct and to have delivered two separate judgments, in that particular case as there was a body of separate evidence which was applicable to each case and that by itself was enough for a conviction, no injustice had followed from that method. These two cases deal, therefore, with a different situation. The procedure laid down by law was substantially followed but there was an irregularity at one or the other stage of a nature which did not go to show that the mode of trial had been substantially departed from that is not the case here

10. The admission in Sessions Cases Nos. 5, 6, 7 and 8 of 1966 of evidence not recorded in the case was therefore not in accordance with law and the convictions and sentences in those cases have to be set aside and a retrial ordered The question then is whether for the same reasons the convictions and sentences in Sessions Case No 4/65 also should be set aside. Mr. Trivedi, the learned advocate for the accused No. 1. fairly concedes before me that It is not possible to contend that in Sessions Case No. 4/66 the learned Judge has proceeded on the evidence not recorded in that case. All the evidence relating to the charge in this case has been recorded in this case. No doubt some other evidence relating to one or the other of the other four cases is also recorded in Sessions Case No. 4/65 but if that evidence is not relevant under the provisions of the Evidence Act, particularly Sections 14 and 15 thereof and has been Improperly admitted, that evidence, having regard to Section 167 of the Evidence Act, could be excluded from consideration and the decision of the court could fairly be based on the remaining admissible evidence. In Emperor Vs. Champaklal Chunilal Banker, the High Court proceeded on the footing that the case in which " the evidence was recorded could be considered although the conviction in the other cases had to be set aside. Therefore" so far as -Sessions Case No. 4/65 is concerned there is no illegality in the procedure which requires the conviction to be set aside. It was argued by Mr. Abichandani, the learned advocate appearing on behalf of accused No. 2 that even if there is no illegality prejudice has been caused to the accused by admission of evidence which is not wholly relevant to the items of misappropriation to which -Sessions Case No. 4/65 relates. Now in respect of each item of misappropriation, witnesses have been examined separately in the five different cases. It is true that some witnesses examined in Sessions Case No 4/65 have also spoken to matters which are related to the other four cases, in addition to the matters which are related

to Sessions Case No. 4/65 That, however, is not a sufficient ground for holding that any prejudice has been caused to the accused in so far as Sessions Case No. 4/66 is concerned, lip has not liecn able to pin-point any piece of evidence, the admission of which has caused that prejudice. If any evidence is not admissible it may be left out of consideration as permitted by Section 167 of the Indian Evidence Act I am not, therefore, able to accept his submission that the accused are prejudiced also in Sessions Case No. 4/65 and on that ground the conviction in that case be set aside and retrial ordered Failing on that argument. Mr. Abichandani at the close of his arguments, submitted that if is not in the interest of his client, meaning accused No. 2, to have Sessions Cases Nos 5, 6. 7 and 8 of 1965 retried. I have not been able to appreciate that argument. If the trial held in those cases is illegal as pointed out earlier there is no course open except to set aside the convictions and as the allegations in those cases are serious it Is but proper that a retrial should take place. It will not be permissible for this court to proceed on the footing that notwithstanding an illegality which is not curable u/ s 537, Cri. P. C., the trial was properly held.