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(1985) 02 GAU CK 0010

In the Gauhati High Court

State of Assam APPELLANT

Vs

Amiruddin and Others RESPONDENT

Date of Decision : 12-02-1985

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 300, 320, 378, 395, 401
Penal Code, 1860 (IPC) — Section 379

Citation : (1985) 02 GAU CK 0010

Hon'ble Judges : K. Lahiri, Acting C.J.;K.N. Saikia, J

Bench : Division Bench

Judgement

K. Lahiri, A.C.J.

1. This reference has been made by Mr. M. M. Sarkar Additional Chief Judicial Magistrate Nagaon purporting to exercise power u/s 395(1) of the Cr. P.C. 1973 for short "the Code".

2. The relevant facts leading up to the reference are that G. R. Case No. 4505 of 1983 was transferred to the learned Magistrate in which five accused were charge-sheeted u/s 379 I.P.C. On 17-1-1984 one Ayub Ali claiming himself to be the first informant of the case and the accused Amiruddin Ahmed filed a joint application seeking permission to compound the offence. The application was signed by one Shri Pabitra Bora Advocate. The parties filed another application to compound the offence. Learned Magistrate examined the first informant and accepted the prayer for compounding the offence and acquitted the accused persons of the charges u/s 3791. P.C. acting u/s 320(2) read with Section 320(8) of the Code.

3. An offence u/s 379 IPC where value of the stolen property does not exceed Rs. 250/- is compoundable u/s 320(2) of the Code provided the offence is compounded by the owner of the property stolen. In the instant case the value of the property did not exceed Rs. 250/- and one Ayub Ali claiming himself to be the owner of the stolen property had compounded the offence so the learned Magistrate was justified in permitting the said complainant to compound the

offence and acquitting the accused u/s 320 of the Code.

4. However, later a person stated to be the real First Informant and owner of the property appeared before the learned Magistrate and filed an application stating that he was the first informant and that an imposter fraudulently obtained the order of acquittal posing himself to be the owner of the property stolen and first informant asked for setting aside the order of acquittal. Learned Magistrate entertained the application, issued notice to the parties and upon hearing them he has made this reference and framed the following question for determination of this Court.

Whether the order of acquittal it. 17-1-1984 is liable to be set aside as the same was obtained fraudulently?

5. Learned Magistrate realised the obvious difficulties that by virtue of order at. 17-1-84 the accused persons were acquitted by him and the provisions of Section 300 of "the Code" debarred him to try them again for the same offence. The provision of Section 300 of "the Code" embodies within it the principle of the English Common Law pleas of "autrefois convict" (formerly convicted) and "autrefois acquit" (formerly acquitted). The accused were acquitted by a competent Court, the order of acquittal was in force i.e. it was not set aside by a superior court. As such the accused could not be tried again for the same offence until the order of acquittal is set aside by a superior court. Compromise of compoundable offence u/s 320(8) of the Code results in acquittal and the accused cannot be tried again for the same offence. In the instant case, till the order of acquittal remains in force the accused are not triable again for the same offence. It means that the court is incompetent to commence any proceeding for trial of the acquitted persons until the order of acquittal is set aside by a competent Court. Section 300 of the Code debars the Court to take up any proceeding for the trial of the acquitted persons. The learned Magistrate realised the position and held that an order of acquittal could be set aside only by the High Court. Learned Magistrate observed that the real first informant Md. Ayub Ali should not suffer due to the order of acquittal obtained fraudulently by an imposter. Accordingly, he has referred the question for the determination of the High Court.

6. Before delving into the merit of the case we would like to observe that the reference made by learned Magistrate is not in proper form. Even the learned Magistrate has misquoted the provision of law under which he made the reference. He has referred Section 439 of the Cr. P.C., 1974. However, the reference cannot be turned down without any answer merely because it was not in proper form or because wrong quoting of the section. In fact it is a reference u/s 395 of the Cr. P.C. 1973.

7. We are of the view that the learned Magistrate has had no jurisdiction to make the reference and in fitness of things he should have directed the party aggrieved by the order of acquittal to move the superior court for setting aside the order of

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acquittal. The provisions for making reference to the High Court by a Magistrate, other than the Metropolitan Magistrate, are provided in Section 395(1) of the Code, which we extract hereinbelow:

395 Reference to the High Court - (1) Where any Court is satisfied that a case pending beforeit involves a question as to the validity of any Act, Ordinance or Regulation or of any provision contained in an Act, or Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefore and refer the same for the decision of the High Court.

(Emphasis supplied)

8. The reference has been made to this Court to decide the question whether the order of acquittal is valid or invalid and as to whether the order of acquittal should be set aside or not by the High Court in exercise of its revisional power. It is seen that Section 395(1) provides for reference where any Court is satisfied that a case is pending before it involves a question as to the validity of any Act, Ordinance or Regulation or any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case. Thus, the court is competent to make a reference only when there is a pending case before it. G. R. case No. 4505/83 was disposed of by the learned Magistrate. He was no longer in seisin of the case and, as such, it is an incompetent reference. Further, validity of any Act. Ordinance or Regulation or of any provision contained in any Act, Ordinance or Regulation is not the subject matter of the reference. The moot question referred is whether learned Magistrate''s order at. 17-1-84 was valid or invalid, which did not attract Section 395 of the Code. As no case was pending before him and as the reference is not for determination of any question as to the validity of any Act, Ordinance or Regulation for which answer was required for disposal of any pending case, we are constrained to hold that the reference is incompetent. The provisions of Sub-section (2) of Section 395 of the Code relate to the procedure and jurisdiction of making reference by a Court of Session or Metropolitan Magistrate with which we are not concerned.

9. For the foregoing reasons we hold that after the court had passed an order of acquittal it has no jurisdiction to entertain any application for modification, alteration or recalling the order of acquittal as the Court became ''functus officio. The Court had no jurisdiction to make this reference u/s 395(1) of the Code. The order of acquittal being final the Court had no jurisdiction to re-open it. Any person aggrieved by the order of acquittal could prefer an appeal against the order u/s 378 of "the Code" or he could prefer a revision against the order. Learned Magistrate should have done well to direct the aggrieved party to take recourse under the provisions of Section 378 and/or 401 of the Cr. P.C. for

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setting aside the order of acquittal.

10. The provisions of Section 378 of the Code provide for appeal against an order of acquittal. Four classes of cases are envisaged in Section 378 of ''the Code''. First, in respect of Government Report cases. Secondly, cases investigated by the Delhi Special Police Establishment or by any other agency referred to in Sub-section (2). Thirdly, complaint cases in which public servant is the complainant; and, Fourthly, any other complaint case. In Government Report cases and the cases referred in Sub-section (2) no special leave is required. However, special leave is necessary where an order of acquittal has been passed in a case instituted upon complaint. Against the order of acquittal in Government Report case the State Government may direct the Public Prosecutor to present an appeal to the High Court against an order of acquittal passed by any Court other than High Court. The instant case is a Government Report case and the State Government is competent to prefer an appeal against the order of acquittal. However, any person aggrieved, including the first informant, has also a remedy open as he can file a revision against the order of acquittal. We have dealt with all these questions in State v. D. N. Bhuyan 1984 Cri LJ 40 Gauh wherein the relevant decisions of the Hon''ble Supreme Court have been referred and relied upon.

11. Where an order of acquittal is based on compounding the offence and the compounding is invalid under the law the acquittal would be liable to be set aside by that High Court in exercise of its revisional power as well. If, in fact, the real first informant did not compound the offence against the accused and the order of acquittal was obtained fraudulently the High Court is competent to set aside the order of acquittal and grant relief to the aggrieved party and/or set aside the order of acquittal. In various cases including The State of Kerala Vs. Narayani Amma Kamala Devi, and Rameshchandra J. Thakkar Vs. Assandas Parmanand Jhaveri, State of Maharashtra, the Supreme Court has held that the High Court can set aside the order of acquittal based on the compounding offence when the compounding itself is invalid under the law. We are of the tentative view that if the order of acquittal has been fraudulently obtained the order of acquittal is also liable to be set aside.

12. When it is alleged that an order of acquittal has been fraudulently obtained and injustice has been caused to the applicant we feel that it is fit case where we should exercise our jurisdiction u/s 401 of the Code. On the basis of the incompetent reference and on perusal of the records of the case which is before us, we direct that a separate case be started as a revision arising out of the order of acquittal at. 17-1-84 in G. R. case No. 4505 of 1983 disposed of by the Additional Chief Judicial Magistrate, Nagaon. We issue notice on the State, the First Informant of the case and the accused to show cause why the order of acquittal at. 17-1-1984 passed by the Addl. Chief Judicial Magistrate, Nagaon in G. R. case No. 4505/83 should not be set aside and/or why such further or other order or orders should not be passed as this Court may seem fit and proper.

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This reference is disposed of accordingly.

Let a copy of this order be sent to learned Additional Chief Judicial Magistrate, Nagaon.

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