

(2016) 03 GUJ CK 0189

In the Gujarat High Court

Case No : Criminal Appeal Nos. 167 and 174 of 2008

State of Gujarat

APPELLANT

Vs

Asgarali

RESPONDENT

Date of Decision : 30-03-2016

Acts Referred:

Constitution of India, 1950 — Article 134(i)(c), Article 20(2)
Criminal Procedure Code, 1973 (CrPC) — Section 300, Section 403, Section 403 (2),
Section 5(1)
Gold (Control) Act, 1968 — Section 85
Prevention of Terrorism Act, 20

Citation : (2016) 03 GUJ CK 0189

Hon'ble Judges : K.S. Jhaveri and G.B. Shah, JJ.

Bench : Division Bench

Advocate : J.M. Panchal, Spl. Public Prosecutor, for the Appellant; B.M. Gupta and C.B. Gupta, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Jhaveri, J.—1. The present appeals are filed by the State of Gujarat being aggrieved and dissatisfied with the common order dated 19th December, 2007 passed below Exhs.602 and 615 in POTA Case No. 12 of 2003 by the learned Addl. Special Judge under POTA, Court No. 14, Ahmedabad, whereby the proceedings filed against original accused No. 11-Asgarali, S/o Mohammad Vazirali and accused No. 12-Mohammadrauf Mohamad Abdulkadar in POTA Case No. 12 of 2003 were dropped under section 300 of Cr.P.C.

2. Facts leading to filing of present appeals are that the respondents-accused in both the appeals were accused in POTA Case No. 10 of 2003 as well as in POTA Case No. 12 of 2003. They were tried in POTA Case No. 10 of 2003 and at the end of trial, both the accused were convicted and sentenced. However, relying upon the same set of facts and depositions of witnesses as were collected in POTA Case No. 10 of 2003, the respondents accused were sought to be tried in POTA Case No. 12 of 2003. Therefore, both original accused No. 11-Asgarali, S/o

Mohammad Vazirali and accused No. 12-Mohammadrauf Mohamad Abdulkadar filed applications at Exhs.602 and 615 respectively to drop the proceedings in POTA Case No. 12 of 2003 under section 300 of Cr.P.C. After hearing the learned advocates appearing for the respective parties, the learned Addl. Special Judge under POTA, Court No. 14, Ahmedabad, vide order dated 19th December, 2007 passed below Exhs.602 and 615 in POTA Case No. 12 of 2003 dropped the proceedings, giving rise to prefer the present appeals by the State.

3. Heard learned Special Public Prosecutor for the appellants-State, Mr. J.M. Panchal and Mr. Gupta, learned advocate for the respondents-accused.

4. Learned Special Public Prosecutor for the State, Mr. Panchal, took us through the provisions of Section 300 of Cr.P.C. and contended that the issues involved in both the cases are operating in different field. He contended that it is the case of the respondents-original accused that they were tried and convicted in POTA Case No. 10 of 2003(murder of Shri Haren Pandya and assault on Shri Jagadish Tiwari) and therefore, on the same set of evidence, they cannot be tried in the present case i.e. POTA Case No. 12 of 2003(case of ISI conspiracy and general conspiracy case) and therefore, the present proceedings are required to be dropped under section 300 of Cr.P.C. According to him, in POTA Case No. 10 of 2003, charge was for limited conspiracy of murder whereas in the present case i.e. POTA Case No. 12 of 2003, charge is for general conspiracy where the terrorist activity was on a larger scale and the persons were sent to Pakistan for training and therefore, the charges in both the cases are different. He further contended that as charges in both the cases are different, it cannot be said that the respondents-accused were tried for "same offence and also for "the same subject matter". He further contended that in POTA Case No. 10 of 2003, issues raised and points for determination were different. He further contended that it cannot be said that judgment in POTA Case No. 10 of 2003 is in respect of same matter, same issue and same charge. He further contended that merely because some common narration, history or reference is made, which is commonly mentioned in both the cases, it cannot be said that they were already tried in earlier trial and the issues raised are adjudicated upon and decided in earlier trial. He drew our attention towards illustration(f) of section 300 which reads as under:

"A, B and C are charged by a Magistrate of the first class with, and convicted by him of, robbing D. A, B and C may afterwards be charged with, and tried for, dacoity on the same facts."

In this connection, he relied upon the decision of the Hon"ble Supreme Court in the case of V.K. Agarwal, Assistant Collector of Customs v. Vasantraj Bhagwanji Bhatia and others reported in (1988)3 SCC page 467 more particularly paras 1,2 and 7 which reads as under:

"1. Does the acquittal of an accused charged with having committed an offence punishable under Section 111 read with Section 135 of the Customs Act, 1969

create a legal bar to the said accused subsequently being prosecuted under Section 85 of the Gold (Control) Act, 1968? The High Court having answered this question (in the affirmative) against the prosecution and having directed the dropping of the subsequent proceedings on the premises that the acquittal in the former proceedings operated as a legal bar to the prosecution of the accused in the latter proceedings, the State has approached this Court by way of the present appeal. By certificate under Article 134(i)(c) of the Constitution of India.

2. Respondents 1 to 3 came to be prosecuted as a result of a raid at their house in which primary gold valued at Rs. 84,770 at the material time was found along with some other articles. They were prosecuted for an offence punishable under section 111 read with Section 135 of the Customs Act, 1969. In that case present respondent No. 3 was convicted whereas present respondent Nos. 1 and 2 were acquitted. The same alleged offenders were later on sought to be prosecuted under Section 85 of the Gold (Control) Act, 1968 relying on the find of primary gold from the very same premises at the time and on the occasion of the very same raid which gave rise to the prosecution under the Customs Act which had culminated in the conviction of respondent No. 3 and the acquittal of respondents 1 and 2. A contention was thereupon raised on behalf of respondents 1 to 3 that the new trial was barred. The Chief Judicial Magistrate accepted this plea and ordered that the prosecution be dropped. The learned Sessions Judge confirmed the said order. The appellant challenged the order passed by the learned trial Magistrate as confirmed by the learned Sessions Judge by way of a Revision Application Criminal Revision Application No. 273 of 1975 to the High Court. The High Court affirmed the decision of the Courts below holding that the present trial was barred by virtue of Section 403(1) of the Code of Criminal Procedure, 1898 (Cr. P.C.). Hence this appeal. In order to determine this question it is necessary to identify the ingredients which will have to be established by the prosecution in order to bring home the guilt under the different provisions. ...

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6. ...

7. Strong reliance has been placed on behalf of the respondents on *Maqbool Hussain v. The State of Bombay & ors. etc. etc.*, [1953] S.C.R. Vol. IV p. 730 in support of the submission that the second prosecution is barred. In *Maqbool*'s case the central issue arose in the context of the fact that a person who had arrived at an Indian Airport from abroad on being searched was found in possession of gold in 458 contravention of the relevant notification, prohibiting the import of gold. Action was taken against him by the Customs authorities and the gold seized from his possession was confiscated. Later on a prosecution was launched against him in the criminal court at Bombay charging him with having

committed the offence under Section 8 of the Foreign Exchange Regulation Act (Act 7 of 1947) read with the relevant notification. In the background of these facts the plea of "autrefois acquit" was raised seeking protection under Article 20(2) of the Constitution of India. This Court came to the conclusion that the proceedings before the Customs authority did not constitute the "prosecution" of the appellant. The Court also took the view that the penalty imposed on him did not constitute a "punishment" by the judicial tribunal. Under the circumstances the trial was not barred. The ratio of the decision is altogether different and has no application in so far as the plea raised by the respondents is concerned. However, reliance is placed on certain observations made in the course of the discussion, at p. 737. To quote:

The test is whether the former offence and the offence now charged have the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other, not that the facts relied on by the Crown, are the same in the two trials. A plea of "autrefois acquit" is not proved unless it is shown that the verdict of acquittal of the previous charge necessarily involves an acquittal of the latter. (Vide Halsbury's Laws of England, Hailsham Edition Vol. 9 pages 152 and 153, paragraph 212).

(Emphasis added)

We have already applied the very test indicated in this passage. But we have reached the conclusion that in the present case this test does not support the respondents' submission in as much as the ingredients of the two offences are different in scope and content. The facts constituting the offence under Customs Act are different and are not sufficient to justify the conviction under the Gold Control Act. It must also be realized that what is necessary is to analyze the ingredients of the two offences and not the allegations made in the two complaints as declared by this Court in *State of Bombay v. S.L. Apte*."

He also relied on the decision of Hon"ble Supreme Court in the case of *Nirmal Singh Kahlon v. State of Punjab and others* reported in , (2009)1 SCC page 441 more particularly paras 53 and 54 which read as under:

"53. Even in *Ram Lal Narang* (supra), we have seen that two of the accused, viz., Mehra and Malik, were common. When two conspiracies are alleged; one is larger than the other, there may be some common factors but the nature of offence would differ. An offence committed would not be judged by mere mentioning of the sections but the mode and manner in which the same was committed as also the nature thereof.

54. Strong reliance has been placed by Mr. Rao on *T.T. Antony* (supra) and *Kari Choudhary* (supra). In *T.T. Antony* (supra), the first FIR was lodged in 1994; another FIR was lodged three years thereafter on the self-same cause of action. *Ram Lal Narang* (supra) in the said fact-situation was distinguished on facts, opining:(*T.T. Antony* Case, p.198, para 21)

"...This Court indicated that the real question was whether the two conspiracies were in truth and substance the same and held that the conspiracies in the two cases were not identical. It appears to us that the Court did not repel the contention of the appellant regarding the illegality of the second FIR and the investigation based thereon being vitiated, but on facts found that the two FIRs in truth and substance were different -- the first was a smaller conspiracy and the second was a larger conspiracy as it turned out eventually..."

Relying upon the principles laid down by the Hon"ble Supreme Court in the aforesaid decisions, he contended that in POTA Case No. 10 of 2003, it was a case of smaller conspiracy whereas in POTA Case No. 12 of 2003, it was a larger conspiracy. He further contended that in the present case, charge was already framed on 1-12-2005 and application to drop the proceedings was submitted on 9-7-2007 and thus, the proceedings could not have been dropped under section 300 of Cr.P.C. He, therefore, urged to quash and set aside the impugned order by allowing the appeals.

5. Mr. Gupta, learned advocate for the respondents-accused, taking us through the evidences of witnesses, contended that evidences of witnesses collected in POTA Case No. 10 of 2003 were the same as were collected in POTA Case No. 12 of 2003. According to him, same and identical evidence were collected in both the cases against the respondents-accused and no additional evidence was collected by the investigating agency in the present case and therefore, since both the respondents-accused in POTA Case No. 10 of 2003 have already been convicted and sentenced for the same set of evidence, they need not have to face trial in POTA Case No. 12 of 2003 under section 300 of Cr.P.C. and the proceedings were rightly dropped by the POTA Court. In this connection, he relied upon a decision of the Hon"ble Supreme Court in the case of Manipur Administration Manipur versus Thokchom Bira Singh reported in , AIR 1965 SC page 87 wherein original Section 403 of Cr.P.C., which is now Section 300 of Cr.P.C., was under consideration of the Hon"ble Supreme Court. It has been held by the Hon"ble Supreme Court in paras 7, 11 and 12 as under:

"7. It is common ground that the respondent cannot bring his case within the provisions of sub-s. (1) of S. 403 and it was also common ground that the trial of the respondent would be permitted by sub-sec. (2). It should, however, be noticed that sub-secs. (1) to (3) of this section deal with the trial of an accused for an offence and his conviction therefor. The question raised for decision in Pritam Singh's case, (S) , AIR 1956 SC 415 however was different and was whether where an issue of fact has been tried by a competent court on a former occasion and a finding has been reached in favour of an accused, such a finding would constitute an estoppel or res judicata against the prosecution not as a bar to the trial and conviction of the accused for a different or distinct offence but as precluding the reception of evidence to disturb that finding of fact when the accused is tried subsequently even for a different offence which might be permitted by the terms of S.403 (2).

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10. ...

11. These two decisions in 1963-3 All ER 510 and AIR 1963 SC 340 being out of the way, we shall address ourselves to the question as to whether what is termed "issue estoppel" which has been held by this Court in Pritam Singh's case, (S) , AIR 1956 SC 415 to be applicable to criminal proceedings is excluded by reason of the provisions of the Criminal Procedure Code, For this purpose learned Counsel invited our attention to S. 5(1) which enacts:

"All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained. "

This, however, in our opinion does not afford any assistance to the argument because Pritam Singh's case, (S) , AIR 1956 SC 415 did not introduce any variation in the Code as regards either investigation, enquiry or trial. As we have pointed out earlier, issue estoppel does not prevent the trial of any offence as does *autrefois acquit* but only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding recorded at an earlier criminal trial before a court of competent jurisdiction. Learned Counsel next drew our attention to the observations of the Privy Council in *Yusofalli Mulla v. The King*, 76 Ind App 158 at page 169 : (, A.I R 1949 PC 264 at p. 267) where the following observations occur :

"The last point urged by Mr. Page was that even if the case did not fall within the terms of S. 403 of the Code of Criminal Procedure the appellant could nonetheless rely on the common law rule that no man should be placed twice in jeopardy."

After stating that even for the application of the Common Law rule of double jeopardy the earlier order had to be by a Court competent to pass a valid order of acquittal or conviction the judgment proceeded :

"This argument therefore fails on the facts, and it is not necessary for Their Lordships to consider whether S. 403 of the Code of Criminal Procedure constitutes a complete Code in India on the subject of *autrefois acquit* and *autrefois convict*, or whether in a proper case the common law can be called in aid to supplement the provisions of the section."

12. As we have pointed out, we are not now concerned with any extension of the principle of *autrefois acquit* but as to the admissibility of evidence which is designed to upset a finding of fact recorded by a competent Court at a previous trial. The reasoning of Lord MacDermott in *Sambasivam's case*, 1950 AC 458 was not the first occasion when this rule as to issue-estopped in a criminal trial was formulated or given effect to. That it is not the same as the plea of double jeopardy or *autrefois acquit* is also clear from the statement of the law by Lord

MacDermott himself. The distinction between *autrefois acquit* and the objection to the reception of evidence to prove an identical fact which has been the subject of an earlier finding between the parties is brought out in the following passage from the judgment of Wright, J., in *The Queen v. Ollis*, 1900-2 QB 758 at pp. 768-769 :

"The real question is whether this relevant evidence of the false pretence on July 5 or 6 ought to have been excluded on the ground that it was part of the evidence given for the prosecution at the former trial, at which the prisoner was charged with having obtained money from Ramsey on that false pretence, and was acquitted of that charge. "

The learned Judge then went on to point out that if the acquittal at the first trial was based on the negating of this basic fact the evidence would be inadmissible but if that acquittal was based on other circumstances the evidence would be admissible. That is why he said :

"An objection in the nature of a plea of "*autrefois acquit*" cannot, of course be maintained, because on either indictment the prisoner could not have been convicted of the offences, or any of them, which were alleged in the other indictment. Nor can there be an estoppel of record or quasi of record,. unless it appears by record of itself, or as explained by proper evidence, that the same point was determined on the first trial which was in issue on the second trial. "

Speaking of this type of estoppel Dixon, J., said in *The King v. Wilkes*, 77 CLR 511 at pp. 518-519 :

"Whilst there is not a great deal of authority upon the subject, it appears to me that there is nothing wrong in the view that there is an issue estoppel, if it appears by record of itself or as explained by proper evidence; that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner. That seems to be implied in the language used by Wright, J. in 1900-2 QB 758 which in effect I have adopted in the foregoing statement..... There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue estoppel should not apply. Such rules are not to be confused with those of *res judicata*, which in criminal proceedings are expressed in the pleas of *autrefois acquit* and *autrefois convict*. They are pleas which are concerned with the judicial determination of an alleged criminal liability and in the case of conviction with the substitution of new liability. Issue estoppel is concerned with the judicial establishment of a proposition of law or fact between parties. It depends upon well-known doctrines which control the re-litigation of issues which are settled by prior litigation."

This decision was rendered in 1948. The matter was the subject of consideration by the High Court of Australia after the decision in *Sambasivam's case*, 1950 AC 458 in *Marz v. The Queen*, 96 CLR 62 at pp. 68-69. The question concerned the validity of a conviction for rape after the accused had been acquitted on the charge of murdering the woman during the commission of the act. In a unanimous judgment by which the appeal of the accused was allowed, the Court said :

"The Crown is as much precluded by an estoppel by judgment in criminal proceedings as is a subject in civil proceedings..... The law which gives effect to issue estoppels is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel still less with the process of reasoning by which the finding was reached in fact..... It is enough that an issue or issues have been distinctly raised or found. Once that is done, then, so long as the finding stands, if there be any subsequent litigation between the same parties, no allegations legally inconsistent with the finding may be made by one of them against the other."

It is, therefore, clear that S. 403 of the Criminal Procedure Code does not preclude the applicability of this rule of issue estoppel. The rule being one which is in accord with sound principle and supported by high authority and there being a decision of this Court which has accepted it as a proper one to be adopted, we do not see any reason for discarding it. We might also point out that even before the decision of this Court this rule was applied by some of the High Courts and by way of illustration we might refer to the decision of Harries, C.J., in *Manickchand Agarwalla v. The State*, , AIR 1952 Cal 730. Before parting, we think it proper to make one observation. The question has sometimes been mooted as to whether the same principle of issue-estoppel could be raised against an accused, the argument against its application being that the prosecution cannot succeed unless it proves to the satisfaction of the Court trying the accused by evidence led before it that he is guilty of the offence charged. We prefer to express no opinion on this question since it does not arise for examination."

In light of the above principle laid down by the Hon"ble Supreme Court and in view of the constitutional provisions stipulated under section 300 of Cr.P.C., he contended that the proceedings in POTA Case No. 12 of 2003 were rightly dropped by the POTA court. He, therefore, sought to dismiss the appeals.

6. We gone through the record pertaining to the case as also the submissions made on behalf of the parties together with the impugned order passed by the POTA Court as well as the decisions relied on by both the learned counsels.

7. On going through the complete evidence collected in POTA Case No. 12 of 2003 as well as in POTA Case No. 10 of 2003, it appears that same set of facts and evidence was led in both the cases. No additional evidence as having collected by the investigating agency in POTA Case No. 12 of 2003 is appearing

on the record. Even the affidavits filed under Section 32 of POTA Act were sought to be relied upon to contend that different police officers have affirmed the affidavits. However, it is to be noted that the averments and contents of both the affidavits are same. On an appreciation of the entire evidence on record, it was held by the POTA Court in paragraph No. 13 of the impugned order that as set of facts is similar and identical in both the cases, it cannot be said that a larger conspiracy is revealed in POTA Case No. 12 of 2003. It was further held that when both the accused were tried, convicted and sentenced in POTA Case No. 10 of 2003 for the conspiracy, second trial relating to the same set of facts and evidence was barred under section 300 of Cr.P.C. We are, therefore, of the opinion that the POTA Court has not committed any irregularity or illegality in passing the impugned order warranting interference by this Court in these appeals. In view of the above, we are of the view that though there cannot be any dispute regarding the principles laid down by the Hon''ble Supreme Court in the decisions relied on by the learned Special Public Prosecutor for the State, same are held not applicable to the present cases. Both the appeals, therefore, require to be dismissed.

8. In the result, both the appeals stand dismissed. Record and proceedings shall be sent back forthwith to the trial court.