Privy Council Appeal No. 30 *of* 1948

Yusofalli Mulla Noorbhoy - - - - - - - - *Appellant*

v.

The King - - - - - - - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 30TH MAY, 1949

Present at the Hearing :

LORD OAKSEY
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT
SIR MALCOLM MACNAGHTEN

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal by special leave against two judgments of the High Court of Judicature at Bombay, dated 17th June, 1947, setting aside two Orders of the Court of the Presidency Magistrate, 6th Additional Court, dated 16th September, 1946, whereby two prosecutions of the appellant for the offences of hoarding and profiteering under the Hoarding and Profiteering Prevention Ordinance 1943 Ordinance No. XXXV of 1943 (hereinafter called " the Ordinance ") were held to be barred by reason of the provisions of section 403 of the Code of Criminal Procedure, since in the view of the learned Magistrate the accused had been previously tried and acquitted on exactly similar charges and facts by a Court of competent jurisdiction. The real question before the Board is whether in the circumstances of the case the plea of *autre-fois acquit* was open to the appellant, and that question in essence depends upon whether the earlier prosecution was before a Court of competent jurisdiction.

The appellant is the sole proprietor of Messrs. Alladin Dhanji, dealers in crockery, glassware, and cutlery, in Bombay. He was charged in the Court of the Presidency Magistrate, 6th Additional Court, under section 13 (1) read with section 5 of the Ordinance with the offence of hoarding. He was also separately charged in the said Court, under section 13 (1) read with section 6 of the Ordinance with the offence of profiteering. He pleaded not guilty to both charges. Section 14 of the Ordinance is in the following terms: —

> " No prosecution for any offence punishable under this Ordinance shall be instituted except with the previous sanction of the Central or Provincial Government or of an officer not below the rank in a Presidency town of a deputy Commissioner of Police, or elsewhere of a District Magistrate empowered by the Central or the Provincial Government to grant such sanction."

Sanction to the appellant's prosecution had been granted before the institution thereof by C. C. Desai, Controller-General of Civil Supplies, who was authorised to give such sanction by virtue of a notification of the Government of India duly published.

The separate hearing of the two charges against the appellant proceeded in the normal manner under the Code of Criminal Procedure; evidence for the prosecution was called, and on the 1st October, 1945, charges were framed; subsequently further evidence was called for the prosecution and some of the witnesses were recalled for cross-examination, and the case was adjourned to the 17th December, 1945. On that date Mr. Khandalawalla, counsel for the prosecution, made a statement which the learned Magistrate took down in the following words:—

> "In view of the High Court decision in Revisional Application No. 191 of 1945, as this Court is not competent to try this offence, he does not wish to tender the witnesses already examined for further cross-examination nor to lead any further evidence."

Thereupon the Magistrate recorded an Order in the following terms. "Mr. Mullick's evidence is deleted. Accused acquitted for reasons to be recorded separately."

On the same day, the learned Magistrate recorded his reasons for the Orders of acquittal in identical terms on the two charges. After referring to the said statement of Mr. Khandalawalla and the Order made upon it the learned Magistrate continued:—

> "On a perusal of the said decision, however, I find that the filing of this charge sheet by the prosecution itself is invalid in law, because the sanction signed is by the Controller-General under a Notification of the Government of India, and the said Notification does not state that the various officers therein mentioned are not below the rank of a District Magistrate. Thus it is the incompetence of the prosecution to proceed against the accused without sanction as provided for in law. As however the invalidity of the sanction invalidates the prosecution in Court, the accused was acquitted."

It is clear from this statement of the learned Magistrate that he had read the decision of the High Court in Revisional Application No. 191 of 1945 and on the strength of that decision reached the conclusion that the prosecution was incompetent. The decision of the High Court in that case was that in order to establish the validity of a sanction under section 14 of the ordinance, it was essential for the prosecution to prove that the officer who signed the sanction was not below the rank of a District Magistrate. The Court did not base its opinion as to the invalidity of the sanction on the omission from the Notification of a statement that the officers referred to therein were not below the rank of a District Magistrate, as the learned Magistrate seems to have thought. The present case arises in a Presidency town, so that, if this decision of the High Court be correct, the prosecution had to prove that the Controller-General of Civil Supplies who gave the sanction was not below the rank of a Deputy Commissioner of Police. As the Controller is not in the same cadre as a District Magistrate or a Deputy Commissioner of Police, the reluctance of the Crown to undertake the task of establishing the comparative status of these officers is understandable.

In addition to his Orders of acquittal the learned Magistrate on the same day passed two Orders under section 517 of the Code of Criminal Procedure, directing that the cutlery, glass, and other articles belonging to the appellant which had been marked as Exhibits in the case, should be returned to him.

The Government of Bombay did not appeal against the two Orders of the learned Magistrate acquitting the appellant, but against his further Orders made under section 517 of the Code of Criminal Procedure the Government filed two appeals, and on the 16th April, 1946, the High Court in such appeals directed that the property should be handed over to the Chief Presidency Magistrate, and that the Orders of the learned Magistrate disposing of the property under section 517 should be set aside.

On the 10th April, 1946, fresh sanctions to prosecute the appellant were obtained from the Government of Bombay, and on the 13th April fresh prosecutions were instituted against the appellant for the same offences and on the same facts as in the former prosecutions.

On the 16th September, 1946, the learned Magistrate acquitted the appellant, holding that the fresh prosecutions were barred under section 403 of the Code of Criminal Procedure. The Government of Bombay appealed against these Orders of acquittal, and, on the 17th June, 1947, the High Court of Bombay allowed the appeals, set aside the Orders of the learned Magistrate acquitting the accused, and directed that the case should be sent to the Chief Presidency Magistrate who was directed to send the case to any Magistrate other than the Magistrate who had made the Orders of acquittal, for disposal according to law.

Section 403 of the Code of Criminal Procedure, so far as relevant, is in these terms:—

> (1) "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 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 under section 236, or for which he might have been convicted under section 237."
>
> (4) "A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequenly charged."

"Explanation: The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section."

The view which the High Court took was that the previous decision of such Court in Revision Application 191 of 1945 was correct, from which it followed that no valid sanction for the first prosecution of the appellant had been obtained. Following the decision of the Federal Court in *Basdeo Agarwalla* v. *King Emperor*, 1945, Federal Court Reports 93, which was based on a clause in another Ordinance expressed in language similar to that used in clause 14 of the present Ordinance, the Court held the earlier prosecution of the appellant to have been wholly null and void, and that accordingly the appellant had not been previously tried by a Court of competent jurisdiction within section 403.

Before this Board the correctness of the decision of the High Court in Revision Application 191 of 1945 has not been challenged, and their Lordships feel no doubt that the decision was correct, and that, as it was not proved that the officer who granted the sanction in the earlier prosecutions was not below the rank of a Deputy Commissioner of Police, those prosecutions were without valid sanction.

Mr. Page for the appellant urged various grounds against the decision under appeal. His first contention was that the expressions "Court of competent jurisdiction" in section 403 (1) and "Court . . . not competent to try the offence" in section 403 (4) refer to a Court competent to try the class of cases in which the particular offence falls, and do not involve that the Court must be competent to try the particular case. In their Lordships' view this argument is quite untenable. The whole basis of section 403 (1) is that the first trial should have been before a Court competent to hear and determine the case and to record a verdict of conviction or acquittal. If the Court was not so competent it is irrelevant that it would have been competent to try other cases of the same class, or indeed the case against the particular accused in different circumstances, for example if a sanction had been obtained. This case fell under section 403 (1) and the terms of section 403 (4) do not call for discussion.

The next contention urged was that the learned Magistrate did not adjudicate on the validity of the sanction. The argument was that the trial had proceeded to the point at which much of the prosecution evidence had been given and the Magistrate had framed a charge; that at that stage

Counsel for the prosecution refused to attempt to prove that a proper sanction had been given or to call further evidence, and that in the circumstances the learned Magistrate had no option but to acquit the accused under section 258 of the Code of Criminal Procedure. This is the view of the matter which commended itself to the learned Magistrate and induced him to hold that section 403 was a bar to the second prosecution. This contention might have had some force in it if it were supported by the facts, if, that is, the Magistrate acquitted the accused because he thought the prosecution had failed to prove their case, and if he was not asked to decide, and did not decide, on the validity of the sanction. But this is not what happened. It is clear, as already noted, that the learned Magistrate himself considered the decision in Criminal Revision Application 191 of 1945 and came to the conclusion, on the basis of that decision, that the sanction was bad, and the prosecution incompetent. This conclusion was clearly right, whether or not the Magistrate correctly appreciated the grounds on which the decision of the High Court was based. Having reached that conclusion the learned Magistrate ought to have discharged the accused on the ground that he had no jurisdiction to try him. The Orders of acquittal were passed without jurisdiction, and could only operate as Orders of discharge.

The next contention was that the failure to obtain a sanction at the most prevented the valid institution of a prosecution, but did not affect the competency of the Court to hear and determine a prosecution which in fact was brought before it. This suggested distinction between the validity of the prosecution and the competence of the Court was pressed strenuously by Mr. Page, but seems to rest on no foundation. A Court cannot be competent to hear and determine a prosecution the institution of which is prohibited by law and section 14 prohibits the institution of a prosecution in the absence of a proper sanction. The learned Magistrate was no doubt competent to decide whether he had jurisdiction to entertain the prosecution and for that purpose to determine whether a valid sanction had been given, but as soon as he decided that no valid sanction had been given the Court became incompetent to proceed with the matter. Their Lordships agree with the view expressed by the Federal Court in *Agarwalla's* case that a prosecution launched without a valid sanction is a nullity.

The next contention was that as the Orders of acquittal passed by the learned Magistrate in the first prosecution were not appealed from they became binding on the expiration of the period limited for appeal by article 157 of the Limitation Act. This is merely to regard another aspect of the same problem. If the Orders of acquittal were passed by a Court of competent jurisdiction, though wrongly, they would be binding unless set aside in appeal. But if the Orders were a nullity there was nothing to appeal against. It may well be that the Government, if embarrassed by the Orders of acquittal, might have applied to the High Court to quash them, and in this connection reference may be made to the decision of the House of Lords in *Crane* v. *Director of Public Prosecutions* [1921] 2 A.C., p. 299. But the omission of Government to take such a step, which was not incumbent, could not convert an order made without jurisdiction into an order passed by a Court of competent jurisdiction. Some emphasis was laid on the conduct of the Government of Bombay in appealing against the Orders passed by the learned Magistrate under section 517 of the Code of Criminal Procedure. It may be that the High Court ought not to have entertained such appeals, but no question as to the validity of the Orders made in these appeals is before the Board. It was rightly conceded by Mr. Page that the action of the Government of Bombay in appealing against the Orders made by the Magistrate under section 517 could not operate by way of estoppel to confer jurisdiction upon the Magistrate which he did not otherwise possess.

The last point urged by Mr. Page was that even if the case did not fall within the terms of section 403 of the Code of Criminal Procedure the appellant could none the less rely on the Common Law rule that no man should be placed twice in jeopardy. But this argument again depends on

whether the earlier orders of acquittal were valid. Under the Common Law a plea of *autre fois acquit* or *autre fois convict* can only be raised where the first trial was before a Court competent to pass a valid order of acquittal or conviction. (*R.* v. *Bowman*, 6 C. and P. 337, *R.* v. *Bates* [1911] 1 K.B. 964, and *R. Marsham* [1912] 2 K.B. 362.) It is true, as pointed out by Mr. Page, that those cases are cases in which there had been a conviction at the earlier trial, but their Lordships see no distinction for the present purpose between a conviction and an acquittal. Unless the earlier trial was a lawful one which might have resulted in a conviction, the accused was never in jeopardy. The case of *R.* v. *Simpson* [1914] 1 K.B. 66, on which Mr. Page relied, is distinguishable because the first Order on which the plea of *autre fois acquit* was based was held by a majority of the Court to be voidable, and not void. This argument therefore fails on the facts, and it is not necessary for their Lordships to consider whether section 403 of the Code of Criminal Procedure constitutes a complete code in India upon the subject of *autre fois acquit* and *autre fois convict*, or whether in a proper case the Common Law can be called in aid to supplement the provisions of the section.

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed.

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In the Privy Council

YUSOFALLI MULLA NOORBHOY

v.

THE KING

DELIVERED BY SIR JOHN BEAUMONT

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