ABDUL REHMAN MAHOMED YUSUF
v.
MAHOMED HAJI AHMAD AGBOTWALA AND ANOTHER

1959

September 15.

(SYED JAFER IMAM and K. N. WANCHOO, JJ.)

Criminal Procedure—Defamation—Facts stated in the charge not mentioned in the complaint—Separate complaint if necessary—Code of Criminal Procedure, 1898 (V of 1898), ss. 198 and 238(3).

The appellant filed a complaint against the respondent and another under ss 385, 389, 500/109 of the Indian Penal Code. The Trial Court found that there was no conspiracy to defame the appellant or to extort money from him and a charge under s. 500 Indian Penal Code only was framed against the respondent. It was found that the facts mentioned in the charge were not stated in the complaint. The Trial Court holding that a separate complaint should have been filed in respect of the offence with which the respondent was charged, acquitted him. The High Court rejected the appellant's application for revision of the order of the Trial Court with the remark "rejected as no offence" The appellant appealed by special leave.

Held, that the offence charged was a separate offence, although of the same kind, from the offence in respect of which the facts had been stated in the complaint. For this separate offence a separate complaint should have been filed in accordance with the provisions of s. 198 of the Code of Criminal Procedure. The provisions of s. 198 of the Code of Criminal Procedure are mandatory. In appeal the Supreme Court could do what the High Court could have done. The order of acquittal of the respondent was a nullity, and the proper order should be one of discharge.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 174 of 1956.

Appeal by special leave from the judgment and order dated the April 15, 1955, of the Bombay High Court, in Criminal Revision Application No. 392 of 1955, arising out of the judgment and order dated December 14, 1954, of the Presidency Magistrate, 15th Court Mazagaon, Bombay in Case No. 532/S of 1953.

E. B. Ghasvala and *I. N. Shroff*, for the appellant.

C. B. Aggarwala, J. B. Dadachanji, S. N. Andley and *Rameshwar Nath*, for respondent No. 1.

H. J. Umrigar, R. H. Dhebar and *T. M. Sen*, for respondent No. 2.

1959

Abdul Rehman Mahomed Yusuf v. *Mahomed Haji Ahmad Agbotwala*

Imam J.

1959. September 15. The Judgment of the Court was delivered by

IMAM J.—A complaint was filed by the appellant on the 4th of December, 1953, against the respondent Agbotwala and one Phirozbai Mazarkhan under ss. 385, 389 and 500/34 and 109 of the Indian Penal Code in the Presidency Magistrate's 15th Court, Mazagoan, Bombay. The accused were summoned. As the accused Phirozbai Mazarkhan could not be produced the trial produced against the respondent Agbotwala (hereinafter referred to as the respondent) only. The Presidency Magistrate was not satisfied, on the evidence, that the respondent and Phirozbai Mazarkhan had conspired either to defame the appellant or to extort money from him. He also held that there was no evidence to show that the respondent knew that Phirozbai Mazarkhan was committing on offence. Accordingly, he declined to frame a charge under ss. 385 and 389/34 and 109 of the Indian Penal Code.

The Presidency Magistrate, however, framed a charge under s. 500, I.P.C., against the respondent who pleaded not guilty. He was of the opinion, after the consideration of the evidence, that the respondent had on the 13th of October, 1952 uttered before Mr. Parab, an advocate, the defamatory words with which he was charged. He was further of the opinion that s. 198 of the Code of Criminal Procedure stood in the way of his taking cognizance. Although the complaint had been made by the person aggrieved, there was no mention therein of the facts which formed the subject matter of the offence with which the respondent had been charged. The complainant, namely, the appellant not having mentioned the facts which constituted the offence with which the respondent had been charged, the charge had been wrongly framed. The Presidency Magistrate was of the opinion that a complaint should have been filed in respect of the offence with which the respondent had been charged. As that had not been done in the recent case the charge had been wrongly framed. He accordingly acquitted the respondent.

Against the decision of the Presidency Magistrate an application in revision was filed by the appellant in

the High Court of Bombay which was dismissed with the remark "Rejected as no offence" Thereafter the appellant obtained special leave from this Court to appeal against the decision of the High Court.

When the appellant filed his complaint before the Presidency Magistrate he referred to the nature of the defamatory statement made by Phirozbai Mazarkhan which was contained is the notice sent to him by Mr. N. K. Parab on behalf of his client Phirozbai Mazarkhan. After giving good many details of the correspondence which ensued thereon, he referred to the part played by the respondent in paragraphs 19 to 24 of the complaint. Whatever was alleged by the appellant was the result of knowledge obtained after enquiries. The most important of these paragraphs, so far as the respondent is concerned, is paragraph 22 which is as follows :—

> "I have also come to know as a result of my enquiries that Accused No. 2 was seen on occasions and at the relevant time going to the office of the said advocate Mr. Parab at Mazagoan with a woman. My enquiries further revealed that Accused No. 2 was in fact instrumental in connection with the aforesaid correspondence and filing a complaint and that though in fact the complaint was filed in the name of Accused No. 1 Accused No. 2 was the real person behind it."

The appellant then finally alleged that Phirozbai Mazarkhan and the respondent had conspired together and in furtherance of their common intention attempted to put him in fear of injury in body and reputation and in property and that they did so with the object of committing extortion. He accordingly asserted that the accused had committed offences under ss. 385, 389 and 500/34 and 109 of the Indian Penal Code.

At the trial the charge which had been framed against the respondent was as follows :—

> "I, H. G. Mahimtura, Presidency Magistrate, hereby charge you Mohomed Haji Ahmed Agbotwala as follows :—
>
> "That you on or about 13-10-52 at Bombay defamed Abdul Rehman Mohamed Yusuf by making

1959

Abdul Rehman Mahomed Yusuf v. Mahomed Haji Ahmad Agbotwala

Imam J.

or publishing to witness N.K. Parab certain imputations concerning the said Abdul Rehman to wit that a woman named Phirozbai Mazarkhan was in his keeping, that he had promised to marry her but did not keep his promise and that he cheated her of her ornaments worth about Rs. 30,000 by means of spoken words intending to harm or knowing or having reason to believe that such imputations would harm the reputation of the said Abdul Rehman and you thereby committed an offence punishable under section 500 of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charge.

"Charge explained.

"Accused pleads not guilty."

It will be noticed that this charge asserts that the respondent had uttered defamatory words to the advocate N. K. Parab. It had not been asserted as a fact in the complaint that the respondent had uttered any defamatory words to Mr. Parab. The utmost which had been asserted therein against the respondent was that he was instrumental in connection with the correspondence that ensued between the advocate Parab and himself and in the filing of the complaint by Phirozbai Mazarkhan against the appellant.

It was urged on behalf of the appellant that the Presidency Magistrate having found that the respondent had uttered the words mentioned in the charge to the advocate Parab, he should not have acquitted the respondent as s. 198 of the Code of Criminal Procedure was no real impediment in the way of the Presidency Magistrate. He had taken cognizance of an offence under s. 500/34 and 109 of the Indian Penal Code on the complaint filed by the appellant. If at the trial it appeared that an offence under s. 500 only had been committed it was open to the Presidency Magistrate to take cognizance of that offence without the necessity of a separate complaint in respect thereof. It was also urged that if the complaint was read as a whole it indicated that the respondent must have uttered the words, the subject matter of the charge,

and that those words were not uttered to Mr. Parab by Phirozbai Mazarkhan only. Finally, it was suggested that even if it be assumed that for the charge framed a separate complaint should have been filed and no cognizance could be taken for the offence charged in view of s. 198 of the Code of Criminal Procedure and that the Presidency Magistrate was right in his opinion that he had wrongly framed such a charge, it was his duty to make a reference to the High Court for the cancellation of the charge. The Presidency Magistrate acted without jurisdiction in proceeding further with the case and recording an order of acquittal on the ground that a complaint stating the facts, upon which the present charge could have been framed, had not been filed.

On behalf of the respondent it was urged that the Presidency Magistrate correctly acquitted the respondent as there was no complaint for the offence as charged and s. 198 of the Code of Criminal Procedure prohibited him from taking cognizance of the offence mentioned in the charge. It was pointed out that the offence of defamation could be committed on several occasions. The charge, as framed, referred to the defamatory words alleged to have been uttered by the respondent to Mr. Parab. This was a separate offence though of the same kind from the offence mentioned in the complaint.

It was further pointed out that although the Presidency Magistrate had expressed the opinion that the respondent had uttered the defamatory words charged to Mr. Parab he had given no grounds upon which he came to this conclusion. If the entire evidence and the attending circumstances were taken into consideration it was clear that the evidence of Parab could not be believed. Even if it be assumed that the Presidency Magistrate wrongly acquitted the accused this was not a case in which the order of acquittal should be set aside.

The submissions made on behalf of the appellant and the respondent were advanced with skill and elaborate arguments were urged in support of the respective contentions.

1959

Abdul Rehman Mahomed Yusuf
v.
Mahomed Haji Ahmad Agbotwala

Imam J.

It seems to us that on the findings of the Presidency Magistrate, he could not have recorded an order of acquittal. The complaint as filed was not with reference to any alleged defamatory words uttered by the respondent to Mr. Parab. Although the Presidency Magistrate believed the evidence of Mr. Parab he was of the opinion that he wrongly framed the charge as the complaint did not state the facts which constituted the offence with which the respondent had been charged. In such a situation the Presidency Magistrate, instead of proceeding to record an order of acquittal, should have brought the matter to the notice of the High Court so that the error might be corrected. As the matter is before us in appeal we can do that which the High Court could have done.

In our opinion, the offence charged was a separate offence although of the same kind from the offence in respect of which the facts has been stated in the complaint. For this separate offence a complaint should have been filed and the provisions of s. 198 of the Code of Criminal Procedure complied with. In our opinion the provisions of that section are mandatory. Even in s. 238 of the Code of Criminal Procedure the importance of the provisions of s. 198 or s. 199 of the Code is emphasised. Cl. (3) of this section specifically states that the provisions of this section do not authorise the conviction of an offence referred to in s. 198 or 199 when no complaint has been made as required by these sections. The Presidency Magistrate wrongly framed the charge, as on the record, when in respect of the offence charged there was no complaint filed and the facts as stated in the complaint actually filed did not make out the offence as charged.

It is clear from the findings of the Presidency Magistrate that the offence of conspiracy and abatement, as alleged in the complaint actually filed, had not been established. He should have then discharged the accused and refrained from framing a charge for an offence in respect of which there was no complaint before him as required by s. 198 of the Code of Criminal Procedure. He had no jurisdiction to frame the charge he had framed. His order of acquittal, therefore, must be regarded as a nullity.

1959

Abdul Rehman Mahomed Yusuf v. *Mahomed Haji Ahmad Aghotwala*

Imam J.

In this appeal this Court can do what the High Court could have done. We accordingly allow the appeal and set aside the order of acquittal made by the Presidency Magistrate but, on the finding of the Presidency Magistrate that no offence of conspiracy or abetment arising therefrom had been established, we direct that the present complaint be dismissed. The respondent is accordingly discharged.

Appeal allowed.

1959

September 15.

JETHANAND BETAB

v.

THE STATE OF DELHI

(now Delhi Administration)

(SYED JAFER IMAM and K. SUBBA RAO, JJ.)

Repeal of Statute—Repealing and Amending Act, object of—Enactment making possession of wireless telegraphy apparatus without licence punishable—Amending Act introducing new section making possession of wireless transmitter without licence liable to heavier punishment—Repeal of Amending Act—Whether amendment introduced by it survives—Indian Wireless Telegraphy Act, 1933 (XVII of 1933), ss. 3, 6 and 6(1A)—Indian Wireless Telegraphy (Amendment) Act, 1949 (XXXI of 1949), s. 5—Repealing and Amending Act, 1952 (XLVIII of 1952), ss. 2 and 4—General Clauses Act, 1879 (X of 1879), s. 6A.

Section 3 of the Indian Wireless Telegraphy Act, 1933 provided that no person shall possess wireless telegraphy apparatus without a licence and s. 6 made such possession punishable. The Indian Wireless Telegraphy (Amendment) Act, 1949, introduced s. 6(1A) in the 1933 Act, which provided for a heavier sentence for possession of a wireless transmitter without a licence. The Repealing and Amending Act, 1952, repealed the whole of the Amendment Act of 1949, but by s. 4 provided that the repeal shall not affect any other enactment in which the repealed enactment had been applied, incorporated or referred to. The appellant was convicted under s. 6(1A) for being in possession of a wireless transmitter on July 31, 1953. He contended that s. 6(1A) had been repealed and his conviction and sentence thereunder could not be sustained.

Held, that s. 6(1A) was saved by s. 6A of the General Clauses Act, 1897, though s. 4 of the Repealing and Amending Act, 1952, did not save it.