

1930

BABUBHAI
TANSUKILAL
v.

MADHAVJI
GOVINDJI

Broomfield J.

Corporation,⁽¹⁾ cited as an authority by Rangnekar J. in *Dinkarrui v. Yeshwantraï*,⁽²⁾ and also *Radhakison Gopikison v. Balmukund Ramchandra*.⁽³⁾ In the case of *Manilal Motilal v. Gokaldas Rowji*,⁽⁴⁾ which the learned Judge himself appears to have made the basis of his decision, it was held that an award could be regarded as an adjustment of the suit under Order XXIII, rule 3, and the terms of that rule make it clear that the Court must first be in a position to hold that the award amounted to a *lawful* agreement or compromise.

For these reasons I agree with the order proposed by my learned brother.

Decree reversed and case remanded.

B. G. R.

⁽¹⁾ [1912] 3 K. B. 257.

⁽²⁾ (1930) 32 Bom. L. R. 1319 at p. 1325.

⁽³⁾ (1929) 31 Bom. L. R. 1403.

⁽⁴⁾ (1920) 45 Bom. 245.

ORIGINAL CRIMINAL.

Before Mr. Justice Mirza.

EMPEROR v. ABLA ISAK.*

1931
January 21.

Criminal Procedure Code (Act V of 1898), sections 403, 236, 237—Indian Penal Code (Act XLV of 1860), sections 302, 304, 109—Trial for offences of murder and abetment—Judge's charge to jury for offence of murder or culpable homicide and abetment of either—Verdict of "not guilty" of murder or abetment thereof—Divided verdict on charge of culpable homicide not amounting to murder—Verdict not accepted by Judge—Fresh trial—Maintainability of charge of culpable homicide not amounting to murder at such trial.

The accused were tried for the offence of murder and abetment thereof, before a Judge and jury. While summing up the charge to the jury the Judge directed the jury to bring in a verdict of culpable homicide not amounting to murder, and abetment thereof if they were satisfied that the evidence for the prosecution fell short of proving the charge of murder and abetment thereof but was sufficient to prove the lesser offence. The jury brought a unanimous verdict of "not guilty" on the charge of murder and abetment thereof, but brought in a divided verdict of 5 to 4 in respect of the charge of culpable homicide not amounting to murder. On this the Judge acquitted the accused of the offence of murder and in respect of the other charges, discharged the jury.

*First Criminal Sessions of 1931, Case No. 4.

The accused were later on put up for trial before another Judge and jury and were charged *inter alia* with the offence of culpable homicide not amounting to murder and abetment thereof. On counsel for the accused objecting to their trial on the said charges :—

Held, that as at the first trial there was no specific charge before the jury of culpable homicide not amounting to murder and abetment thereof, they were not bound to return a verdict in respect of those offences unless they were of opinion that the accused could be held guilty of those offences instead of murder and abetment thereof. The accused, therefore, could not be tried again for the offences of culpable homicide not amounting to murder and abetment thereof because of the provisions of section 403 of the Criminal Procedure Code.

Emperor v. Nirmal Kanta Roy,⁽¹⁾ distinguished.

CRIMINAL trial before a Judge and jury at the Criminal Sessions of the Bombay High Court.

The accused in this case were tried before N. W. Kemp J. and a special jury at the final Criminal Sessions of the Bombay High Court for the year 1930. The charges against them were preferred under four separate counts. Under the first count, accused No. 1 was charged under section 392 read with section 394 of the Indian Penal Code, with the offences of robbery and causing voluntary hurt while committing robbery. Under the second count, he was charged with murder under section 302 of the Indian Penal Code. Under the third count accused No. 2 was charged with having aided and abetted accused No. 1 in the offences under sections 392 and 394. Under the fourth count, accused No. 2 was charged under sections 302/109 with having aided and abetted accused No. 1 in the commission of murder. There was no specific charge against the accused in respect of the offence of having committed culpable homicide not amounting to murder or abetment thereof. The learned Judge in his charge to the jury directed them to bring in a verdict of "culpable homicide not amounting to murder" and abetment thereof in case they were satisfied that the evidence for the prosecution fell short of establishing the graver

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⁽¹⁾ (1914) 41 Cal. 1072.

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charge of murder and abetment thereof but was sufficient for the establishment of the less serious charge. On this the jury brought in a unanimous verdict of "not guilty" on the charges under the second and fourth counts. They were divided by five to four as regards the finding on the offence of culpable homicide not amounting to murder and abetment thereof. They also returned a similarly divided verdict as regards charges under the first and third counts. The learned Judge acquitted the accused of charges of murder and abetment thereof, and ordered—"Jury are discharged as to other charges; accused to remain in custody."

Both the accused were then put up for trial before Mirza J. and a jury under the provisions of section 308 of the Criminal Procedure Code. Charges against them were again preferred under four counts. The first and the third counts were the same as the first and third counts at the previous trial. Under the second count on this occasion accused No. 1 was charged with the offence of culpable homicide not amounting to murder under section 304 of the Indian Penal Code. Under the fourth count accused No. 2 was charged with abetment of the said offence under section 304 read with section 109. At the second trial counsel for the accused contended that under the provisions of section 403 of the Criminal Procedure Code, it was not competent to the Court to try the accused under the second and the fourth counts.

Gomes, for the Crown.

Dr. P. N. Daruwala, for the accused.

MIRZA, J. :—[After setting out the facts of the case his Lordship proceeded:] An objection is taken on behalf of the accused to the second and fourth counts in the charge-sheet and it is urged that a trial on those points is not now competent. Reliance is placed upon

section 403 of the Criminal Procedure Code which provides :—

“ 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 such 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.”

Section 236 of the Criminal Procedure Code provides :—

“ If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.”

Section 237 provides :—

“ If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.”

It is clear that although there was no separate charge at the original trial of culpable homicide not amounting to murder against accused No. 1 and of aiding and abetting the commission of culpable homicide not amounting to murder against accused No. 2, it would have been competent to the jury, if satisfied by the evidence before them, to have found the accused guilty of those offences respectively and not of the major offences of murder and abetment of murder with which they were respectively charged. Mr. Gomes on behalf of the prosecution has contended that the lesser charges in respect of culpable homicide not amounting to murder and abetment of that offence must be regarded as being implied in the major charges of murder and abetment of murder and there would be no need to set them out separately as charges at the original trial to entitle the Crown to have a re-trial on the lesser charges in case the verdict of the jury at the original trial in respect of the lesser offences cannot be accepted. He

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relies on the case of *Emperor v. Nirmal Kanta Roy*,⁽¹⁾ where the facts were that the prisoner had been originally tried at the Criminal Sessions of the High Court for the murder and abetment of murder of a police-officer under section 302 read with section 34 and section 302 read with section 114 and section 302 read with section 109, Indian Penal Code, and also for the murder and culpable homicide of another person under sections 302 and 304, Indian Penal Code. The jury returned a unanimous verdict of acquittal under section 302 read with section 34, Indian Penal Code, in the first case, and unanimously acquitted the accused under section 302 in the second case, but differed as to the remaining charges by five to four and were discharged. The prisoner was put up for re-trial at a subsequent Criminal Sessions of the High Court on a charge of culpable homicide not amounting to murder in respect of the second case. An objection was taken on behalf of the prisoner that such a re-trial was not competent and that the provisions of section 403 of the Criminal Procedure Code were a bar to it. The Court negatived this contention and held that the prisoner was not being "tried again" within the meaning of section 403 but that his re-trial was on the original indictment and plea and that the Court was continuing the trial before another jury and the process could continue till a verdict was passed on all the counts. The learned Judge in the course of his judgment observes (p. 1083) :—

"In this case the evidence discloses only one illegal act, as far as Ananta is concerned, and the accused has been charged in the alternative with having committed murder or culpable homicide of Ananta, a procedure the correctness of which has not been disputed. Section 403, however, protects him only against a trial for murder and 'and any other offence for which a different charge from the one made against him might have been made'. But the offence of culpable homicide, for which it is now proposed to try him, is the same charge that was made against him, and on the terms of the section therefore this defence must fail."

⁽¹⁾ (1914) 41 Cal. 1072.

The facts in the present case are materially different from those in *Emperor v. Nirmal Kanta Roy*.⁽¹⁾ In this case there were no specific charges before the jury of culpable homicide not amounting to murder and abetment of culpable homicide not amounting to murder. The jury were not bound to return a verdict in respect of these offences unless they were of opinion that the accused could be held guilty of these offences instead of murder and abetment of murder. Had these specific charges been framed in the original trial, the jury would be bound to return a verdict on them. The position at the present trial seems to be this, that two charges are preferred against the two accused respectively which charges were not specifically framed against them in the original trial. The case, in my opinion, is covered by the provisions of section 403 of the Criminal Procedure Code and a fresh trial on the second and fourth counts is not competent. The trial should proceed under the first and third counts only.

Order accordingly.

B. K. D.

⁽¹⁾ (1914) 41 Cal. 1072.

APPEAL FROM ORIGINAL CIVIL.

*Before the Honourable Mr. J. W. F. Beaumont, Chief Justice,
and Mr. Justice Blackwell.*

BSMAIL ISSAC CHAND (ORIGINAL DEFENDANT), APPELLANT *v.* ABDULLA
HAJI CASSUM AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1930
September 2

Bombay City Municipal Act (Bom. Act III of 1888), section 147—Lease—Lessor covenantiing to pay all existing and future rates and taxes except water-tax—Lessor's liability to pay enhanced taxes on basis of lessee's recovery of higher rent from sub-tenants.

Under a lease of buffalo stables it was provided that the lessee was to pay the Municipal bill for water and that the lessor was to pay all "other existing and future rates, taxes, charges and outgoings whatsoever", in respect of the said premises. After the premises were let, the Bombay Municipality recovered

*O. C. J. Appeal No. 11 of 1930; Suit No. 1602 of 1928.