P L D 1966 Supreme Court 708

Present: A. R. Cornelius, C. J., S. A. Rahman, Fazle-Akbar, B. Z. Kaikaus and Hamoodur Rahman, JJ

Criminal Appeal No. 8 of 1965

NUR -ELAHI-Appellant

Versus

(1) THE STATE

(2) ZAFARUL HAQ

(3) NAWAZ-UL-HAQ-Respondents

AND

Criminal Appeal No. 9 of 1965

NUR ELAHI-Appellant

Versus

(1) Ch. IKRAM-UL-HAQ

(2) THE STATE-Respondents

Criminal Appeals Nos. 8 and 9 of 1965, decided on 12th November 1965.

(On appeal from the judgments and orders of the High Court of West Pakistan, Lahore, dated the 17th August 1964, and 9th November 1964, in Criminal Revision No. 774 of 1964 and Criminal Miscellaneous Case No. 1029 of 1964, respectively).

(a) Constitution of Pakistan (1962), Art. 58(3)-Leave to appeal to Supreme Court-Granted to consider question whether "special procedure" laid down by High Court for trials of two cases relating to same murder instituted respectively by police and a private complainant, against two quite separate sets of accused, had the "sanction of law".

(b) Criminal Procedure Code (V of 1898), Ss. 233 & 239 read with S.43, Evidence Act (I of 1872)--Criminal trial-Separate trials on private complaint and police challan

relating to same murder-Procedure recommending examination of common witnesses only once and their statements read out as evidence in other case not supportable-[Ali and others v. The Crown P L D 1954 Lah. 183

Noor Ahmad v. The State and Rahim Bakhsh v. The State P L D 1964 S C 120 and Ali Muhammad v. Amir Ali and others Criminal Miscellaneous No. 998 of 1945 ref.].

(c) Criminal Procedure Code (V of 1898), S. 498-Bail Accused in murder case admitted to bail by High Court on medical grounds-Separate trials for murder involving two different versions sponsored by private complaint and police challan-One version "entirely' favourable to accused-Supreme Court declined to interfere.

(d) Criminal Procedure Code (V of 1898), Ss. 233 & 239 read with Ss. 208, 213, 270, 286 & 540-A-(Separate or joint trial) (Murder case)-(Commitment proceedings)-Two versions of case, with two totally different sets of accused, put forward by complainant in private complaint and by State in police challan-Committing Magistrate making two orders of commitment-Procedure to be adopted by Sessions Judge at trial-By majority: per S. A. Rahman, J., Cornelius, C. J., Fazle-Akbar and Hamoodur Rahman, JJ., agreeing: Complaint case to be taken up first and prosecution witnesses listed in police challan to be also examined, "as Court witnesses" under S. 540-A-Police challan to be taken up only if complaint case results in acquittal and in case of conviction, police case to be withdrawn by Public Prosecutor under S. 494, Criminal Procedure Code (V of 1898)-Per Kaikaus, J., contra: Difficulties to be encountered in adopting procedure recommended in majority judgment-Procedure does not solve difficulty in legal rnanner-Principle of "consolidation" of proceedings in civil matters-Civil Procedure Code (V of 1908), S. 151-Inherent powers of Court to adopt procedure not prohibited by Civil Procedure Code (V of 1908)-Consolidation of criminal proceedings not open to objection No express prohibition in Criminal Procedure Code (V of 1898) against joint trials in cases other than those permitted by Code Difficulties following from provisions of S. 270, Criminal Procedure Code (V of 1898) that all trials before a Court of Sessions are to be conducted by a Public Prosecutor-Proper course for Public Prosecutor to lay both versions before Court-No bar to joint committal of both sets of accused.

(e) Evidence Act (I of 1872), S. 43-Debars reading of evidence recorded in another case as evidence in case in hand-[Criminal trial-Evidence]-Violation of rule vitiates judgment.

Criminal Appeal No. 8 of 1965

Ijaz Hussain Batalvi, Advocate Supreme Court, instructed by Ziaudin Ahmad Qureshi, Attorney for Appellant.

S. Nasiruddin, Advocate-General West Pakistan (lftikharul Haq Khan, Advocate Supreme Court with him), instructed by Ijaz Ali, Attorney for Respondent No. 1.

Nazir Ahmad Khan, Senior Advocate Supreme Court (Iqbal Ahmad Siddiqui, Advocate Supreme Court with him), instructed by Maqbool Ahmad Qadri, Attorney for

Respondents Nos, 2 and 3,

Criminal Appeal No. 9 of 1965

Abdul Majid Asghar, Senior Advocate Supreme Court, instructed by Wali Muhammad, Senior Attorney for Appellant.

Nazir Ahmad Khan, Senior Advocate Supreme Court, Rashid Murtaza Qureshi Advocate Supreme Court, with him), instructed by S. M. Shah Mashhadi, Attorney for Respondent No. 1.

S. Nasiruddin, Advocate-General, West Pakistan, (Iftikhar-ul-Haq Khan, Advocate Supreme Court with him), instructed by Ijaz Ali, Attorney for Respondent No. 2.

Date of hearing: 12th November 1965.

JUDGMENT

S. A. RAHMAN, J.-The facts giving rise to these appeals, by special leave, are as follows:

The murder of one, Muzaffar Piracha, was reported to the Police and the first information mentioned Ch. Zafar-ul-Haq, Ikram-ul-Haq and Nawaz-ul-Haq, as the alleged murderers. The Police, however, prosecuted one, "Ch. Ikram" and Banarass, as the culprits, after an investigation. Ch. Zafar-ul-Haq and his son, Nawaz-ul-Haq were mentioned in

column No. 2 of the challan, implying thereby that no case had been found against them by the Police. Nur Elahi, complainant, then put in a complaint giving his own version of the incident as set forth in the first information report. At the stage of commitment proceedings, the question arose as to how the complaint case and the challan case were to be dealt with. The matter was brought up to be considered by the High Court of West Pakistan, in Criminal Revision No. 1049 of 1963. A learned Single Judge disposed of that Revision Petition with the direction that the complaint and the challan shall be consolidated for the purpose of recording evidence. The witnesses common to both the cases were to be produced only once They would be first examined by the State Prosecutor, then by the Counsel for the complainant and cross- examined by the counsel for the accused. Any additional evidence beyond the testimony of witnesses mentioned in the challan was also allowed to be produced by the complainant subject to the same procedure.

As a result of the committal inquiry the learned Magistrate made two separate commitment orders in the two cases. The learned Additional Sessions Judge, Rawalpindi, who was to try the cases, rejected an application put in by the complainant praying that there should be two separate trials. He evidently intended to have a joint trial of the two sets of accused, though they contained no common name. It may be mentioned that according to the Police challan, Banarass was accompanied by one, "Ch. Ikram," who was apparently not identified and therefore is not to be confused with Ikram-ul-Haq, accused of the other case. The complainant then approached the High Court, again for redress in revision. The same learned Judge heard the Revision Petition and held that a joint trial of the two sets of accused would not be legal. He, therefore, set aside the order of the learned Additional Sessions Judge and ordered that there should be two separate trials. He gave further directions which are contained in paragraph 8 of his judgment reproduced below:-

> "8. About the procedure to be followed during the trial, however the learned Additional Advocate-General and the learned counsel appearing for both the sides are there are any common witnesses in the two cases, they should be examined only once and their evidence read in both the trials. In other words, the procedure similar to the one which was adopted during the commitment proceedings, should be adopted during the trial as well. The first case, however, to be taken up should be the challan case submitted by the prosecution. Any

> additional evidence which the complainant wishes to lead in his case shall be recorded after the conclusion of the evidence in the challan case. I have already said that the evidence of common witnesses will be recorded once and read in both the cases. It would be advisable for the learned Sessions Judge or the learned Additional Sessions Judge trying both the cases to deliver judgment simultaneously."

From this order special leave to appeal was granted by this Court to consider the question whether the special procedure laid down for the trials, by the learned Judge, had the sanction of law.

There is authority for the view taken by the learned Single Judge that a joint trial of the two sets of accused, in circumstances like the present, would be in contravention of the provisions of section 239 of the Code of Criminal Procedure. Reference may be made, in this connection, to Ali and others v. The Crown (P L D 1954 Lah. 183) and Noor Ahmad v. The State and Rahim Bakhsh v. The State (P L D 1964 S C 120). The correctness of this view also seems to have been assumed by a Division Bench of the Lahore High Court in Ali Muhammad v. Amir Ali and others (Criminal Miscellaneous No. 998 of 1945 decided by the High Court on 8th/9th November 1945). A copy of the judgment in that case has been supplied to us by the learned Advocate-General for the Province. The two sets of accused cannot be said to be persons accused of the same offence, committed in the course of the same transaction within the meaning of clause (a) of section 239 of the Code of Criminal Procedure. Either the one set or the other may have been really guilty of the offence in question and they could not be said to have participated in the same transaction together.

The question then is what should be the procedure to be adopted by the learned trial Judge in disposing of these two cases. It has been conceded by the learned Advocate-General as well as by Ch. Nazir Ahmad Khan who appeared for the three accused persons in the complaint case, that paragraph 8 of the judgment of the learned Single Judge, in so far as it directed that witnesses should be examined only once and their statements read out as evidence in the other case, is not supportable in law. To that extent, the appeal is well-founded and must succeed on this point.

The question how the two cases should be proceeded with so as to cause no prejudice to either party, is one of difficulty in

the circumstances mentioned and has caused us some concern. The learned Advocate-General suggested that we might issue directions similar to those embodied by the Lahore High Court in the unreported case cited above. The learned Judges observed therein that it would be desirable, should the trial Judge decide to hear first the case based on the Police version, to summon the witnesses supporting the counter version as Court witnesses under section 540-A of the Code of Criminal Procedure, so that the record contains all the relevant evidence. Similar procedure was directed to be adopted during the trial of the complaint case. After considering all aspects of the matter, we hold that a fair procedure would be for the learned trial Judge to take up the complaint case first for trial. During that case the learned trial Judge may call the witnesses mentioned in the Police challan, if they were not already examined on behalf of the complainant, as Court witnesses under section 540-A of the Criminal Procedure Code, so that they can be cross-examined by both the parties. This will enable the Court to have the whole relevant evidence in cluded in one trial and a decision could be arrived at after a proper consideration of the entire material relied on by the parties. The accused persons would in addition obviously have the right to adduce defence evidence if they so choose. If that trial results in a conviction, it will be for the Public Prosecutor to consider whether or not he should withdraw from the prosecution, with the permission of the Court, under section 494 of the Code of Criminal Procedure, in the Police challan case. It would be easy for him to take such a decision after the whole evidence has been thrashed out in the first trial. If the first case ends in an acquittal, he might still have to consider whether the Police version has not been so seriously damaged by what has been brought out in the first trial, as to justify withdrawal of the prosecution. Otherwise the second trial would be allowed to proceed to its normal conclusion and the parties would have the advantage of utilizing the material placed on the record of the earlier trial, by way of cross-examination of the relevant witnesses as permitted by law.

This procedure is being suggested to avoid a difficulty that might otherwise confront the complainant. If the Police challan is taken up first for trial, the complainant would be under a handicap in so far as he would not be in a position to cross examine the witnesses for the prosecution.

Another difficulty may arise in respect of conducting the case on behalf of the complainant in the first trial. Normally, of course, under the law, the Public Prosecutor is to be in charge

of the case, even if the trial is based on a private complaint. The. Public Prosecutor, however, in the social circumstances of the case, could permit the complainant's counsel to conduct they proceedings on his behalf under his directions. Alternatively and that may meet the situation more adequately, Government in the' interest of justice, could notify the complainant's counsel, as a special Public Prosecutor, for the conduct of that case alone. This would ensure full justice to the complainant and he would not be left with any sense of grievance. He is at present challenging the bona fides of the Police investigation We, therefore, allow the appeal and direct that the trials will be taken up by the Judge in accordance with the observations made above.

This disposes of the appeal: Nur Elahi v. The State and others Criminal Appeal No. 8 of 1965. There then remains Appeal No. 9 of 1965, Nur Elahi v. Ch. Ikram-ul-Haq and the State, which is directed against the grant of bail to Ch. Ikram-ul-Haq accused. This accused was granted bail by the High Court on medical grounds and after hearing Mr. Abdul Majid Asghar on D behalf of the appellant, Nur Elahi, we are not inclined to interfere with the impugned order, in the circumstances of this case. There are two versions, one of which is entirely favourable to Ch. Ikram-ul-Haq appearing in this case. This appeal is therefore, dismissed.

B. Z. KAIKAUS, J.-The law is that every criminal proceeding (and in fact every civil proceeding) is to be decided on the material on record of that proceeding and neither the record of another case nor any finding recorded therein should affect the decision. If the Court takes into consideration evidence recorded in another case of a finding recorded therein the judgment is vitiated. A finding recorded in a criminal case is not legal evidence in another criminal proceeding. In fact there is an express provision in the Evidence Act, that is, section 43, which debars the Court from taking it into consideration. It makes no difference that the finding is recorded by a High Court or the Supreme Court. It remains irrelevant. The Court which is to determine a matter must determine the matter itself unaffected by opinion expressed in other cases.

The above statement of law would not seem to be open to any objection and in fact appears to be based on good principle, yet it creates difficulties when the same incident is the subject matter of two different criminal proceedings. The law does permit more than one criminal proceeding in respect of the same matter. There may be cross cases where each of the two

opposite parties charges the other with the commission of offences in respect of the same incident or there may be different versions as to who committed an offence, put forward by different parties that move the Court. Cross cases will be separate cases and the same applies to the other category. As under the law every separate proceeding is to be decided on its own record, and is not affected by the decision in another case it is obvious that there is possibility of a conflict between decisions in proceedings in respect of the same matter. But while we recognize the absolute correctness of the proposition that all proceedings must be decided on their own record we are at the same time not prepared to allow conflicting decisions with respect to the same incident or matter. It would be absurd that in respect of the same incident different persons be convicted in different proceedings on stories inconsistent with each other. One Court may hold that `A' bad murdered `B' while another Court may be holding that `C' had murdered `B' and both `A' and `C' may be punished for the murder of `B' on the basis of stories that falsify each other. In civil cases we do not mind conflicting decrees being passed with respect to the same property between different parties. They are judgments in personam and no harm can result therefrom.

But it is different in criminal cases where persons have to be punished. It cannot be tolerated that for the same incident more than one person be convicted on mutually exclusive stories.

What then is the way out of this difficulty? How can conflicting decisions be avoided in cross cases or cases where there are two or more prosecution stories involving two or more sets of persons? The difficulty has in the past arisen generally in R relation to cross cases and has been met by giving a direction that they should be tried by the same Magistrate or Judge and that judgment should in both cases be delivered at the same time. But the question that arises is whether this was a legal method of getting out of the difficulty. The obvious intention or the object in saying that the same Magistrate or Judge should try the cases and that he should deliver judgment at the same time was to ensure that no inconsistency arose between the judgments in the two cases. This would mean that the Judge while delivering judgment in one case was to take into consideration and be affected by the finding which he had reached in the other case or by the judgment which he was going to deliver in the other case. Could such a procedure be justified by law? If there were two separate Magistrates or Judges trying two cases and

one of them inquired from the other as to the judgment which he was going to deliver and having received information about that judgment moulded his own judgment accordingly we would be horrified. It would appear to us to be in disregard of the elementary principles of administration of justice. But on principle there does nut appear to me any difference between one Judge asking another as to the judgment he is going to deliver and the same Judge asking himself as to the judgment he is to deliver in the other case. The one is as much open to objection as the other. The principle involved is that an accused person or a party to a criminal proceeding is not to be affected by a conclusion reached by a Judge or Magistrate in another proceeding. It will be unjust to a party in one of the two cross cases that what the decision is going to be in his case should be affected by the judgment which is to be delivered in the other case.

In the judgment which is being delivered in this case by my brothers a direction is being given that the complaint case should be tried first, (the witnesses supporting both stories being put in the witness box), and what is to happen to the other case should be determined by the result of that trial. If the trial results in a conviction the Public Prosecutor may consider whether he should not withdraw the other case. If the trial results in an acquittal then the other case may be proceeded with. With very great respect this procedure will hardly solve the difficulty in a legal manner. Let us assume that in the complaint case the accused are convicted by the Sessions Judge. In that case will it be proper that the Public Prosecutor should withdraw the other case and whether proper or not is he bound to do so? The State may have come to a definite conclusion that the story of the complainant is untrue and the Public Prosecutor may not agree to withdraw the other prosecution. (I may observe here that according to my own view the State or the Public Prosecutor should not take upon themselves the responsibility of the correctness of a version and should leave the matter to the Court).

At the same time although the accused are convicted by the Sessions Judge the High Court or the Supreme Court may set aside the acquittal and may come to the conclusion that the State story is the true one. If the Public Prosecutor withdraw the other case one set of the accused would be acquitted by the High Court or the Supreme Court and against the other set the case would stand withdrawn in spite of the finding of the High Court or the Supreme Court that the State case was true. But, to consider the other alternative, the Public Prosecutor is not bound to withdraw the case and in fact as I have already said

he should not withdraw it if the investigating agency of the State is definite as to its conclusion. If he does not withdraw the case what is to be done after there is a conviction in the first case? Should the other case be proceeded with or not? The Sessions Judge is bound to decide the second case on the basis of the record without reference to the previous decision and he may record another conviction. It may be said that the second case should be delayed till the first case is decided by the Supreme Court. But even after that case is decided by the Supreme Court can the Court before which the other case is pending (for the accused having been committed the case is already pending with the Sessions Judge) look at the judgment of the High Court or the Supreme Court at all? He is in law debarred from doing so. There is an express prohibition in the Evidence Act but even on accepted general principles neither the prosecutor nor the accused can be affected by the judgment of the Supreme Court. I have heard an observation that whatever be the law as a matter of fact there is no Sessions Judge who will disregard the judgment of the High Court or the Supreme Court. With great respect I am unable to concur that we can give a direction which presumes and is based on the commission of an illegality. The duty of the Sessions Judge is to abide by the law and disregard the High Court and the Supreme Court judgments in respect of the decision on facts.

It may perhaps be said that there is no way out of the difficulty at all and that we have to put up with an illegality. I am of the opinion that this is a misapprehension. The difficulty which arises in criminal cases has been arising in civil cases too. The same matter may be involved in separate civil proceedings. With respect to the same property or the same right there may be different pieces of litigation. The civil law does not debar suits with respect to the same property or the same right between different persons. When the parties to the separate proceedings are not the same the civil law does not feel concerned in the matter at all. But if the parties are the same in pending proceedings difficulty would be created if the two proceedings are separately decided. There may be a suit for restitution of conjugal rights by the husband. The wife may have filed a suit for declaration of nullity of marriage or for its cancellation. Conflicting decisions with respect to the same matter cannot be allowed to be given in separate suits yet every proceeding has to be decided on its own record and unless some step is taken to avoid this result there may be conflicting decisions. The civil Courts have in order to meet this difficulty adopted the device of consolidation of proceedings. There is no provision in the Civil Procedure

Code for consolidation of proceedings. Yet it is settled law now that proceedings can be consolidated by virtue of the inherent powers of the Court. In respect of the powers of a Court as to procedure the principle which has always been accepted is that the Court has power for ends of justice to resort to all procedure which is not prohibited by the enactment which regulates its procedure. This principle is contained in section 151, of the Civil Procedure Code. I do not see any ground for holding that the consolidation of criminal proceedings is open to any objection. It may be argued that there are provisions in the Criminal Procedure Code as to joint trials and that we cannot resort to joint trials in cases not permitted by the Code. There is no express provision in the Criminal Procedure Code saying that joint trials apart from those mentioned in the relevant provisions would not be in accordance with law. It is true that there are a number of cases wherein it has been held that joint trial apart from that for which there is a provision in the Criminal Procedure Code is illegal. In the first place I do not think the Criminal Procedure Code was envisaging the kind of case with which we are dealing if we impute to it an intention to confine joint trial to cases to which it refers. In the second place the consolidation of proceedings and joint trial of accused are entirely different matters. In the Civil Procedure Code also there are provisions as to who can be joined as defendants. Those provisions are wholly inapplicable to a case of consolidation of proceedings. While consolidating civil proceedings the Court is not affected by the fact that any particular party cannot be joined along with another party in the same suit having regard to the provisions of Order 1, C. P. C. The consolidation of suits is the consolidation of two separate proceedings into one. At the same time even assuming that the provisions as to joint trial will be contravened, I do not feel bound to hold that the trial will be vitiated, and if I have to choose out of two alternatives, the first being the holding of a joint trial and the other the clear contravention of section 43 of the Evidence Act and of the general principles that a party is not to be affected by a finding in another case, I would choose the first alternative as being at least not being in conflict with statute and not being a contravention of a fundamental principle of administration of justice.

I would, therefore, direct in a case like the present that the two proceedings be consolidated and that there be a single hearing, that the whole of the evidence be produced before the Sessions Court and then a decision recorded. I may point out here that there were other difficulties also in the trial of the complaint case apart from the trial of State case. According to

section 270 every trial before a Court of Session is to be conducted by a Public Prosecutor. What is to happen in the complaint case when the Public Prosecutor d6es not accept the story put forward by the prosecution. It may be said that the Public Prosecutor may hand over the prosecution in such a case to the private complainant. But we will again be trying to get over a legal provision. The Criminal Procedure Code does not refer to handing over by the Public Prosecutor of the prosecution to any body else. At the same time section 270 gives an indication as to the mind of the Legislature. The law intends that all prosecutions before the Sessions Judge should be by the Public Prosecutor so that it is not envisaged that two versions of the same incident should be put forward in two different proceedings. The proper course for the Public Prosecutor is to lay before the Court both the stories and produce all the evidence relating to both the stories and then leave the Court to find out the truth. The Public Prosecutor should not take upon himself the correctness of a particular story. In fact I see no bar to a joint committal of both sets of accused. The Criminal Procedure Code contains no prohibition as to a joint committal. That would perhaps solve the whole problems.

A. H. Appeal dismissed.

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