

1958

September 11.

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THE STATE OF WEST BENGAL

(JAFER IMAM and J. L. KAPUR JJ.)

Special Judges jurisdiction of—Convicting of offence not specifically empowered to try—Defect of jurisdiction, if curable—West Bengal Criminal Law Amendment (Special Courts) Act, 1949 (W. B. XXI of 1949), s. 4(2), Schedule—Criminal Law Amendment Act, 1952 (XLVI of 1952)—Code of Criminal Procedure (V of 1898), s. 529(e)—Indian Penal Code (XLV of 1860), ss. 116, 161 and 165A.

On September 6, 1952, the appellant, who was being tried by an Assistant Sessions Judge and a jury, was caught while giving a bribe to one of the jurors. By a notification dated November 27, 1952, the Government of West Bengal, acting under s. 4(2) of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, entrusted the case against the appellant under s. 161/116 Indian Penal Code to the Special Judge, Burdwan, for trial. Before this date as a result of the introduction of s. 165A in the Indian Penal Code by the Criminal Law Amendment Act, 1952, providing for punishment for abetment of offences under ss. 161 and 165, abetment of s. 161 had ceased to be an offence under s. 161/116 though it was an offence specified in the Schedule to the West Bengal Act. The records were received by the Special Judge on December 23, 1952, and he took cognizance of the case. On February 10, 1954, a charge under s. 165-A Indian Penal Code was framed by the Special Judge and on June 7, 1954, the appellant was convicted under s. 165-A and sentenced to rigorous imprisonment for six months. An appeal to the High Court of Calcutta was dismissed. The appellant obtained special leave and appealed.

Held, that the special Judge had no jurisdiction to try and convict the appellant for the offence under s. 165A Indian Penal Code as when the case was distributed to the Special Judge s. 165A was not one of the offences specified in the Schedule of the West Bengal Act. The case which was distributed to the Special Judge was one under s. 161/116 Indian Penal Code, an offence which was non-existent at that time. Section 165A cannot be deemed to have been specified in the Schedule merely because abetment of the offences under ss. 161, 162, 163 and 165 Indian Penal Code was specifically mentioned in the Schedule. The offence under s. 165A is a distinct offence. It is not merely a restatement of the offence of abetment under s. 116; it comprises also abetment under s. 109 and provides for an enhanced penalty.

This defect of jurisdiction could not be cured by s. 529(e) of the Code of Criminal Procedure. Section 529(e) applied to

Magistrates and would not apply to Special Judges whose jurisdiction arose not on their taking cognizance under s. 190 of the Code but on the case for offences specified in the Schedule being distributed to them by the State Government by a proper notification.

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CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 29 of 1956.

Appeal from the judgment and order dated August 24, 1955, of the Calcutta High Court, in Criminal Appeal No. 196 of 1954, arising out of the judgment and order dated June 7, 1954, of the Court of the Judge, Special Court, Burdwan, in Special Court case No. 10 of 1952.

S. C. Issacs and S. N. Mukherjee, for the appellant.

B. Sen and P. K. Bose, for the respondent.

1958. September 11. The Judgment of the Court was delivered by

KAPUR J.—This is an appeal by leave of the High Court of Calcutta against the judgment and order of that Court dismissing the appellant's appeal against the order of conviction by the Special Court of Burdwan for an offence under s. 165-A, Indian Penal Code and six months' rigorous imprisonment.

Kapur J.

The facts leading to this appeal are, that one Istipada Ghosh and his son were being tried in the court of an Assistant Sessions Judge, Burdwan, with a jury of five. During the course of the trial the appellant approached one of the jurors Baidya Nath Mukherjee and offered him illegal gratification as an inducement for giving a verdict favourable to Ghoshes. On the morning of September 6, 1952, the juror narrated these facts to the police and thereupon the officer in charge sent a Sub-Inspector to arrest the appellant if he offered the bribe. After a little while the appellant came to the appointed place and offered Rs. 40 in four 10 rupee notes to the juror and while he was trying to pass those notes to the juror the Police Officer arrested the appellant. The First Information Report for an offence under ss. 161/116, Indian Penal Code was made soon after. And after investigation a report

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was made by the police officer in charge Burdwan police station which resulted in the case being sent to the Special Judge, Burdwan. On November 27, 1952, the Government issued the following notification No. 6603J under s. 4(2) of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 (W. B. XXI of 1949):

"In exercise of the power conferred by sub-section (2) of section 4 of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949 (West Bengal Act XXI of 1949), the Governor is pleased to distribute to the Burdwan Special Court constituted by notification No. 4632J, dated the 22nd August, 1952, under section 2 of the said Act the following cases involving offences specified in the Schedule to the said Act to be tried by the said Special Court:—

(4) The State versus Bhajhari Mondal, son of Bhuson Chandra Mondal of Katwa Station Bazar Police Station Katwa, district Burdwan under sections 161/116 of the Indian Penal Code.....".

This notification shows that the offence charged against the appellant was one under ss. 161/116 of the Indian Penal Code.

The order sheet of the Special Court shows that the records of the case State v. B. C. Mondal under ss. 161/116 Indian Penal Code were received by the Special Judge on December 23, 1952, and the Special Court took cognizance of the case, the appellant was summoned for appearance on January 22, 1953, and he did appear on that day. On December 21, 1953, after several adjournments the hearing of the case was fixed for January 29, 1954, on which date the examination of witnesses commenced. On February 10, 1954, a charge under s. 165A, Indian Penal Code was framed by the Special Judge. The trial ended on June 7, 1954, and the appellant was convicted under s. 165A of the Indian Penal Code and sentenced to six months' rigorous imprisonment. Against this order of conviction the appellant took an appeal to the High Court of Calcutta which was dismissed. It held that the appel-

lant had rightly been convicted under s. 165A and that the Special Court had jurisdiction to try the offence under that section from July 28, 1952, to May 9, 1953, under s. 7 of the Central Act (XLVI of 1952) and from May 9, 1953, under the West Bengal Act (W. B. XV of 1953). It also held that any defect in the taking of cognizance was curable under s. 529 (e) of the Criminal Procedure Code and that as a matter of fact the Special Judge took cognizance under s. 165A and not under ss. 161/116, Indian Penal Code. On December 16, 1955, the High Court granted leave to appeal to this Court.

Counsel for the appellant has not contested the appeal on any question of fact but has confined his arguments to the question of jurisdiction. He contended that the Special Judge had no jurisdiction to try the case as (1) at the time he took cognizance of the case, s. 165A, Indian Penal Code, was not an offence specified in the Schedule of West Bengal Act XXI of 1949; (2) the case distributed to him was one under ss. 161/116 an offence which no longer existed in the Indian Penal Code; (3) the Special Judge was exercising jurisdiction under the West Bengal Act (W. B. XXI of 1949) and not under the Central Act (XLVI of 1952) as no Special Judges were appointed by the State Government under that Act; (4) the appellant could not be tried under the West Bengal Act XV of 1953 because there was no distribution of a case against him under s. 165A, Indian Penal Code. In order to decide these matters it is necessary to set out the dates on which the various statutes came into force and to see what provisions were made therein. On March 11, 1947, Prevention of Corruption Act (Act II of 1947) was enacted by the Central Legislature. The West Bengal Legislature enacted the West Bengal Criminal Law Amendment Act of 1949 (W. B. XXI of 1949) which received the assent of the Governor-General on June 23, 1949. Its preamble shows the objects of the Act to be more speedy trial and more effective punishment of certain offences. By s. 2 of this Act, Special Courts were set up in West Bengal which under s. 3 were to be presided over by Special

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Judges. Section 4 provided for allotment of cases for trial to the various Special Judges and also authorised the Provincial Government to transfer any case from one Special Judge to another and to make modifications in the description of cases (whether in the name of the accused or in the charges preferred or in any other manner) as may be considered necessary. The Special Judge had jurisdiction to try the cases for the time being allotted to him under s. 4 (1) in respect of such of the charges for the offences specified in the Schedule as may be preferred against the accused. All cases pending before any court or before any other Special Judge were deemed to be transferred to the Special Judge to whom they were allotted. The Special Judge when trying a case allotted to him could also try any offence whether specified in the Schedule or not with which an accused could be charged at the same trial. By s. 5 the Special Judge could take cognizance of a case without the case being committed and was to follow the procedure of warrant cases and the court of the Special Judge was deemed to be a court of Session trying without a jury. By s. 8 rules of evidence were amended in certain particulars. Section 9 provided for enhanced punishment. By s. 10 the provisions of the Prevention of Corruption Act were made applicable. The schedule to the Act enumerates the offences triable by a Special Judge, the relevant items of which were :

(1) "An offence punishable under ss. 161, 162, 163 or s. 165 of the Indian Penal Code.

(8) Any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in items 1 to 7".

On July 28, 1952, the Central Legislature enacted the Criminal Law Amendment Act (Act XLVI of 1952) by s. 3 of which an offence of abetment, s. 165A—with an enhanced punishment was inserted.

S. 165A. "Whoever abets any offence punishable under section 161 or section 165, whether or not that

offence is committed in consequence of the abetment, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine or with both”.

By s. 6 the State Government were authorised by notification to appoint Special Judges for various areas to try the following offences :

(a) “an offence punishable under section 161, section 165 or section 165A of the Indian Penal Code (Act XLV of 1860) or sub-section (2) of section 5 of the Prevention of Corruption Act (II of 1947) ;

(b) any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).....”.

By s. 7 exclusive jurisdiction was conferred on Special Judges. The effect of this enactment was the insertion in the Penal Code of an offence 165A and the creation of Special Judges to be appointed by the State. On August 12, 1952, the Central Legislature passed another Act, the Prevention of Corruption (Second Amendment) Act (59 of 1952), s. 3 of which changes the rules of evidence in regard to presumption and onus by adding sub-s. 2 to s. 4 of the principal Act by which it was provided :

“Where in any trial of an offence punishable under section 165A of the Indian Penal Code (Act XLV of 1860) it is proved that any gratification (other than legal remuneration) or any valuable thing has been given or offered to be given or attempted to be given by an accused person, it shall be presumed unless the contrary is proved that he gave or offered to give, or attempted to give that gratification or that valuable thing, as the case may be, as a motive or reward such as is mentioned in section 161 of the Indian Penal Code or, as the case may be, without consideration or for a consideration which he knows to be inadequate”.

On July 30, 1952, an Act, to amend the West Bengal Act XXI of 1949, the West Bengal Criminal Law Amendment (Special Court Amending Act) (W. B. XII of 1952) received the assent of the President and came into force. Section 3 of this Act substituted a new s. 2 in place of s. 2 of the West Bengal Act (W. B. XXI

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of 1949). This substituted section authorised the State Government to constitute Special Courts and to appoint Special Judges to preside over such courts which had jurisdiction throughout West Bengal. By s. 5, the following was substituted in place of s. 4 of the West Bengal Act XXI of 1949:

“(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898) or in any other law, the offences specified in the Schedule shall be triable by Special Courts only:

Provided that when trying any case, a Special Court may also try any offence other than an offence specified in the Schedule, with which the accused may under the Code of Criminal Procedure, 1898, be charged at the same trial.

(2) The distribution amongst Special Courts of cases involving offences specified in the Schedule, to be tried by them shall be made by the State Government.”

The Schedule under the West Bengal Act (W.B. XXI of 1949) was also amended by the insertion of s. 164 Indian Penal Code only. The West Bengal Act XXI of 1949 was further amended by the West Bengal Criminal Law Amendment (Special Courts) Amending Act, 1953 (Act XV of 1953). It received the assent of the President and came into force on May 9, 1953. This Act added s. 165A, Indian Penal Code in item No. 1 of the Schedule of the 1949 West Bengal Act.

The result of these various enactments, Central as well as State was the creation of Special Courts to try offences which were specified in the case of West Bengal (W. B. XXI of 1949) in the Schedule and in the case of Central Act in the body of the Act itself. The West Bengal Act (W. B. XXI of 1949) created Special Judges to try cases involving offences specified in the Schedule and allotted to them by the State Government alone. Under the Central Act (XLVI of 1952) also the State Government was authorised to appoint Special Judges and the offences specified in the Act were triable by such Judges as stated in s. 7(2) of the Act. The procedure to be followed by the

Special Judges was that prescribed for the trial of warrant cases. Therefore the jurisdiction of Special Judges appointed under this State enactment to try cases relating to offences specified in the Schedule arose only when they were allotted to them. By the West Bengal Amending Act of 1952 (W. B. XII of 1952) in place of "Special Judges" the words "Special Courts" were substituted and two conditions necessary for conferring jurisdiction on such Courts were: (1) cases to be tried related to offences specified in the Schedule and (2) the State Government had to make the distribution of such cases to the various Special Courts. Therefore no Special Court had jurisdiction to try a case unless it was for offences specified in the Schedule and the State Government distributed it to the Special Court.

The notification in the present case specified the name of the accused, the offence for which he was to be tried as one under s. 161/116, Indian Penal Code, and the case was distributed to the Special Court, Burdwan for trial. On the date of the notification s. 161 and abetment of s. 161 were offences specified in the Schedule but as a result of the amendment by the Criminal Law Amendment Act 1952 (XLVI of 1952) s. 165A had been inserted in the Code providing for punishment for abetment of offences mentioned in ss. 161 or 165. Section 165A created a distinct and separate offence and therefore abetment of an offence under s. 161 was no longer an offence under s. 161/116 of the Code. Section 165A was not included in the Schedule to the West Bengal Act (W. B. XXI of 1949). Counsel for the State contended that this section although not specifically mentioned was all the time specified in and must be deemed to have been specified in the Schedule to the West Bengal Act (W. B. XXI of 1949) because item 8 specifically mentioned abetment of offences in items 1 to 7 and that s. 165A only prescribes punishment for abetment of offences under ss. 161 or 165 and cannot be called a new or a different offence. Section 165A is not merely a restatement of the offence of abetment under s. 116 of the Code. It

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also comprises abetment under s. 109 of the Code and provides an enhanced penalty of three years imprisonment instead of 1/4th of three years imposeable under s. 116. It further attracts the application of s. 4 (2) of the Prevention of Corruption Act (II of 1947) as subsequently amended. It cannot be said therefore that merely because the abetment of an offence under s. 161 was specified in the Schedule of the West Bengal Act of 1949, s. 165A which did not then exist in the Penal Code, must be deemed to have been specified therein. It is significant that the West Bengal Act was further amended on May 9, 1953, by Act XV of 1953 in order to include s. 165A in the Schedule.

It appears therefore that under the notification the case distributed to the Special Court for the appellant's trial was for a non-existing offence because when the Special Judge took cognizance of the case there was no such offence as ss. 161/116 of the Indian Penal Code. The notification did not mention s. 165A of the Code and at the time when the Special Judge purported to take cognizance he had no jurisdiction to do so and to try the case as the offence under s. 165A was not in the Schedule of the West Bengal Act, 1949, as amended in 1952.

The crucial date for the purpose of determining the jurisdiction of the Court would be the date when the Court received the record and took cognizance of the case and took any step in aid of the progress of the case and not when the evidence of the witnesses began to be recorded. Under s. 4 of West Bengal Act (W.B. XXI of 1949) as amended by the Act of 1952 the jurisdiction of the Court arises when the notification is issued distributing the case to a particular Special Court giving the name of the accused and mentioning the charge or charges against him which must be under one of the offences specified in the Schedule. In the absence of any of these elements the Special Court would have no jurisdiction.

The High Court held :

- "that the offence under section 165A was always triable by a Special Judge only from 28th July, 1952, to 9th May, 1953, under section 7 of the Central Act

and from 9th May, 1953, under the W. B. Act XV of 1953".

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As already stated the case which was distributed to the Special Judge was one under s. 161/116, Indian Penal Code an offence not then existing in the Code and as s. 165A was not in the Schedule as an offence triable by a Special Judge it could not be held that the Special Judge was trying the appellant for an offence under s. 165A. There is nothing to indicate that the appellant was being tried upto May 9, 1953, under s. 7 of the Central Act. No notification of the State Government appointing any Special Judge under s. 6 of the Central Act (Act XLVI of 1952) was brought to our notice. It was on the other hand stated by counsel for the State that there was no such notification. Nor is there anything to show that the Special Judge of Burdwan was trying the appellants' case under s. 7 of that Act. We are of the opinion that the trial was not under the Central Act, 1952. Nor could the trial be under the provisions of West Bengal Act XV of 1953 because no distribution of the appellants' case was made to the Special Judge by a notification mentioning the charge against him to be one under s. 165A, Indian Penal Code. The High Court also said:

"It is true that if the offence under section 165A be regarded as a distinct offence, the Special Judge appointed under the W. B. Act had no jurisdiction in December 1952 to take cognizance of the offence and cognizance could be taken only by a Special Judge appointed under the provisions of the Central Act. But since in such case the Special Judge must be deemed to have acted erroneously in good faith, the provisions of section 529(e) of the Criminal Procedure Code would apply and the proceedings would not be vitiated.....It is trial without jurisdiction that vitiates a proceeding (section 530 Cr. P. C.) and not taking of cognizance in good faith without jurisdiction".

But that with respect, is an erroneous application of s. 529 of the Code of Criminal Procedure which provides:

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“ If any Magistrate not empowered by law to do any of the following things, namely :

.....
(e) to take cognizance of an offence under section 190, sub-section (1), clause (a) or clause (b);

erroneously in good faith does that thing, his proceedings shall not be set aside merely on ground of his not being so empowered.”

This section applies to Magistrates and would not apply to a Special Judge whose jurisdiction arises not on his taking cognizance under s. 190 of the Code of Criminal Procedure, but on the case for an offence specified in the Schedule being distributed to him by the State Government by notification. The defect of jurisdiction therefore cannot be cured by s. 529(e) of the Code of Criminal Procedure. The Special Judge was consequently not a Court of competent jurisdiction and the proceedings before him were null and ineffectual.

We are of the opinion, therefore, that when the case was distributed to the Special Court which is the basis of the jurisdiction of that Court, s. 165A was not one of the offences specified in the Schedule and consequently the appellant could not be tried for and convicted of that offence. The conviction is therefore by a Court which had no jurisdiction to try the case against the appellant and the whole proceedings in this case are null and void.

We would accordingly allow the appeal and set aside the conviction of the appellant under s. 165A, I. P. C., and the sentence imposed thereunder.

Appeal allowed.