APPELLATE CRIMINAL

Before Mr. Justice Rajadhyaksha and Mr. Justice Vyas.

VITHAL s/o MARUTI (ORIGINAL ACCUSED), APPELLANT *v.* STATE.*

1952
Feb. 27

Bombay Beggars Act (XXIII of 1945), ss. 5, 6 and 23—Whether ultra vires *by virtue of discrimination on the ground of place of birth—Constitution of India, Art. 15.*

The Bombay Beggars Act, 1945, does not discriminate between beggars only on the ground of the place of birth and is, therefore, not *ultra vires* of the Constitution.

Under Art. 15 of the Constitution of India discrimination which is forbidden is discrimination on ground only of religion, race, caste, sex, place of birth or any of them. Where discrimination is based not only on the incidence of birth but on some other consideration along with the place of birth, the bar of the Constitution does not arise.

Under s. 23 (*1*) of the Bombay Beggars Act, 1945, beggars neither born nor domiciled in the Province of Bombay can be dealt with under s. 5 or under s. 23 of the Act.

Criminal Appeal against the Order of conviction and sentence passed by D. D. Yennemadi, Presidency Magistrate, 11th Court, Kurla Bombay.

One Vithal (accused) was found begging in a public place on October 7, 1951. He was charged under s. 5 (5) read with s. 6 (3) of the Bombay Beggars Act, 1945. The trying Magistrate convicted him of the offence with which he was charged and ordered detention of the accused in a certified institution for a period of ten years and further directed that a period of one year out of the term of ten years be converted into a term of one year's rigorous imprisonment.

The accused appealed to the High Court.

D. M. Parulekar (appointed), for the appellant.

K. S. Daundkar, Assistant Government Pleader, for the State.

VYAS J. This is an appeal by one Vithal son of Maruti who has been convicted by the learned Presidency Magistrate, 11th Court, Kurla, Bombay, under s. 5, sub-s. (5), read with s. 6, sub-s. (3), of the Bombay Beggars Act (Bom. XXIII of 1945). The order passed against him is one of detention for a period of ten years in a certified institution of Male Beggars Home, Worli, and it has further been directed that a period of one

* Criminal Appeal No. 11 of 1952.

1952

VITHAL
v.
STATE

Vyas J.

year out of the above mentioned term of ten years should be converted into a term of one year's rigorous imprisonment. The allegation against the appellant was that he was found begging in a public place on October 7, 1951. The learned trial Magistrate declared him a beggar under s. 5, sub-s. (*4*), of the Act, and proceeded to pass the order, mentioned above, against him under s. 5, sub-s. (*5*), read with s. 6, sub-s. (*3*), of the Act.

Now, Mr. Parulekar's first contention, in this appeal, is that the entire scheme of the Bombay Beggars Act (XXIII of 1945) is *ultra vires* of the Constitution, as a discrimination is made therein as between beggars on the basis of place of birth. Our attention is invited by Mr. Parulekar to s. 5, sub-s. (*4*), of the Act, which says:

"If on making the inquiry referred to in sub-s. (*1*) the Court is satisfied that such person was found begging it shall record a declaration that the person is a beggar. The Court shall also determine after making an inquiry in the manner prescribed whether the person was born in the Province of Bombay and domiciled therein and shall include its findings in the declaration. The Court shall subject to the provisions of s. 23 make further order as in this section hereinafter provided."

It is argued by Mr. Parulekar, on the basis of this section, that such of the beggars as are born in the Province of Bombay and domiciled in the said Province are dealt with under s. 5, sub-s. (*4*), and in their case, provided there is a conviction for the second or subsequent time under sub-s. (*1*) of s. 6, the order of detention in a certified institution has got to be for a period of ten years and liberty is reserved to the Court to convert any period of the said detention, not exceeding two years, into a sentence of imprisonment. Then we are referred to sub-s. (*1*) of s. 23 of the Act, which says:

"If in the course of an inquiry made under sub-s. (*1*) of s. 5, it has appeared to the Court that the person declared a beggar under sub-s. (*1*) of s. 5, is neither born nor domiciled in the Province of Bombay the Court, after making such further inquiry, if any, as it deems necessary, may, instead of proceeding further under s. 5, by order in writing direct the beggar to leave the Province of Bombay within such time and by such route or routes as may be stated in the order and not to return thereto."

And it is argued that this section refers only to cases of beggars who are neither born nor domiciled in the Province of Bombay. Under this section, such beggars are not liable to detention in a certified institution and are also not liable to have a certain period of detention converted into a sentence of imprisonment. They are liable only to externment. From

this, an argument is made before us by Mr. Parulekar that the Act makes a discrimination between beggars born in the Province of Bombay and beggars born outside the Province of Bombay and is therefore *ultra vires* of the Constitution of India. The contention must fail. Apart from the fact that it is not correct to say that beggars neither born nor domiciled in the Province of Bombay cannot be dealt with under s. 5, sub-s. (5), read with s. 6 of the Act, it is to be noted that under art. 15 of the Constitution of India, discrimination, which is discountenanced and forbidden, is discrimination on ground *only* of religion, race, caste, sex, place of birth or any of them. Where discrimination is based not only on the incidence of birth but on some other consideration along with the place of birth, the bar of the Constitution does not arise at all. Now, s. 5, sub-s. (4), of the Bombay Beggars Act, speaks of two things, namely, place of birth and domicile, both being in the Province of Bombay, and one of these ingredients is not to be read to the exclusion of the other. In our view, the term "domicile" as used in the Act means residence in the Province of Bombay without present intention of removing it from the Province of Bombay. It is not used in its technical sense in the Act. Before the Constitution of India came into force, there was nothing like domicile in the Province of Bombay. There was only one domicile and that was the domicile of India. Therefore, in construing the word 'domicile' in this Act of 1945, we must interpret it to mean residence in the Province of Bombay. The element of birth at a particular place is not a necessary constituent of the term 'domicile' as used in the Act. Therefore, it is clear that s. 5, sub-s. (4), of the Act, does not deal with beggars whose place of birth *only* is in the Province of Bombay. In these circumstances, the contention of Mr. Parulekar, namely, that the Act makes a discrimination as between beggars on the ground of place of birth and is therefore *ultra vires* of the Constitution, is unsustainable. There is no section in the Act which makes a discrimination as between beggars only on the ground of place of birth.

The second contention of Mr. Parulekar, namely, that in case of beggars neither born nor domiciled in the Province of Bombay s. 23 of the Bombay Beggars Act only applies and the said beggars are dealt with only under that section, is not correct. We have already quoted the section once in this judgment and therefore do not deem it necessary to reproduce it textually again. The word 'may' in the expression

1952

VITHAL
v.
STATE

Vyas J.

'may instead of proceeding further under s. 5, by order in writing direct' is important. The expression is not 'shall, instead of proceeding further under s. 5, by order in writing direct.' In our opinion, upon a proper construction of s. 23, sub-s. (*1*), it would appear that beggars neither born nor domiciled in the Province of Bombay can be dealt with either under s. 5 or under s. 23 of the Act. What the Act contemplates is that if the beggars are born in the Province of Bombay and domiciled in the Province of Bombay, the proper section to apply is s. 5 only; but if the beggars are neither born nor domiciled in the Province of Bombay, there are two alternative sections either of which may be applied, namely, s. 5 or s. 23. In this particular case, the finding of the learned trial Magistrate is that the appellant was born in Madhya Pradesh and has a domicile in that Pradesh. Clearly therefore, his case would be governed by the provisions of s. 5 or s. 23. This aspect was, it clearly appears to us, not present in the mind of the learned trial Magistrate at all. Had it been present in his mind, we are not sure which of the two sections he would have used against the appellant. Accordingly, we set aside the order of detention and imprisonment passed against the appellant by the learned trial Magistrate and remand the case to the learned Magistrate's Court, so that the learned Magistrate may use his discretion whether he should proceed against the appellant under s. 5 of the Act or under s. 23 thereof. Of course, if he chooses to exercise his discretion in favour of proceeding under s. 23 of the Act, there would be no question of any order of detention or of converting any period out of that term of detention into a term of imprisonment. But, if, in the exercise of the option referred to above, he decides to proceed against the appellant under s. 5 of the Act, then, he will have to consider whether any period out of the term of detention should be converted into a term of imprisonment. Now, in this case, as we have noted already above, the learned Magistrate, in passing an order of detention for ten years, has ordered that a period of one year out of the said term should be converted into a sentence of imprisonment. In this connection, it is contended before us that the period of imprisonment ordered is excessive. We do not wish to express any opinion upon the point, since we are remanding the case to the learned Magistrate in order to decide for himself whether he should exercise the option in favour of one section or the other (s. 5 or s. 23) of the Act,

while proceeding against the appellant. But, in case he eventually decides to adopt the procedure of s. 5 of the Act, he would, no doubt, take the circumstances of the case into consideration, and the circumstances are that although the appellant was convicted under s. 5, sub-s. (5), of the Act, on March 28, 1951, he was found begging again in a public place on October 7, 1951. It is not clear, as the record stands before us, whether the appellant escaped from the place of detention, or whether he was released under a license granted under s. 20 of the Act. Of course, no license granted under the Act can, and quite naturally so, permit begging. Therefore, even assuming that he might have been released under a license under s. 20 of the Act, there could be no justification in his begging in a public place after release. These circumstances will, no doubt, be borne in mind by the the learned Magistrate, in case he decides to use s. 5 of the Act against the appellant.

Order set aside: case remanded.

K. B. S.

APPELLATE CRIMINAL

Before Mr. Justice Gajendragadkar and Mr. Justice Chainani.

LALDAS ONKARDAS AND OTHERS v. STATE.*

1952
April 14.

Indian Penal Code (Act XLV of 1860), ss. 120B, 218—Criminal Procedure Code (Act V of 1898), s. 197—Charge of criminal conspiracy—Prosecution not bound to include all acts of conspirators in charge—Public servant charged with falsely framing several documents—Sanction to prosecute granted only in respect of one document—Trial in respect of other documents whether vitiated—Joint trial of several accused for more than one offence—Sanction necessary in respect of one offence committed by one of the accused—Absence of sanction—Whether whole trial becomes void without proof of prejudice to other accused—Duty of lawyers in cases where sanction is required.

In a case of criminal conspiracy the prosecution is not bound to make all the acts committed by the conspirators in pursuance of the conspiracy the subject-matter of the charge, and, therefore, the trial is not vitiated by reason of the fact that the charge does not include some of the acts of the conspirators.

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* Criminal Appeal No. 454 of 1951 [with Cr. Rev. Appln. No. 799 of 1951 and Cr. Appeal No. 968 of 1951 (By Government) and Cr. Appln. No. 1102 of 1951.].