

Ningthoujam Vs. Manipur Administration

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Court : Guwahati

Decided On : Jan-24-1961

Judge : T.N.R. Tirumalpad, J.C.

Appellant : Ningthoujam

Respondent : Manipur Administration

Judgement :

T.N.R. Tirumalpad, J.C.

1. This is a revision against the order of the learned Additional Sessions Judge (II), Manipur, dismissing the appeal filed by the petitioner against his conviction under Section 323, I.P.C. passed by the First Class Magistrate, Bishenpur - Shri M. Nabakumar Singh and against the sentence of three weeks' R.I. imposed on him.

2. There were two accused persons in the criminal case and one was acquitted by the Magistrate. The case against the petitioner was that on 15.8.1959 he assaulted one Jugol Singh when the latter went for taking fish from his Loos and caused a bleeding injury. The Magistrate Shri Nabakumar Singh, examined 6 P.Ws. between 13.10.1959 and 20.11.1959 before framing the charge and he adjourned the case to 16.12.1959 for the examination of the accused.

3. On 16.12.1959, he questioned the accused persons in detail. One is unable to understand the purpose of such detailed examination at that stage of the case even before the Magistrate had decided whether to frame a charge against the

accused persons. If one reads the questions put by the Magistrate and the answers elicited from the accused one would find that the examination of the accused by the Magistrate amounted to a stiff cross-examination and that the Magistrate did not put to the accused the evidence given by the P.Ws. against them. The Magistrate should have realised that the prosecution had to make out a prima facie case and that any questioning of the accused at that stage should not be intended to help the prosecution in that effort. The Magistrate also must be guarded that such questioning, which of course, is permitted under Section 253, Cri.P.C. should not in any manner, prejudice the subsequent defence of the accused.

The examination of the accused under Section 253, Cri.P.C. has to be on the evidence given by the prosecution witnesses and it is intended only to give him an opportunity to have his say on the prosecution evidence. Section 253 gives no authority to the Magistrate to make a searching cross-examination of the accused or to elicit incriminating answers. That will be compelling an accused to be a witness against himself which is prohibited under Article 20 of the Constitution. The examination under Section 253 is intended so that the Magistrate may take the explanation of the accused along with the prosecution evidence to proceed under Section 254, Cri.P.C. This will be borne in mind by all the Magistrates.

4. However, we are not very much concerned in this revision petition with this mistake committed by this Magistrate. It is enough to say that the examination of the accused under Section 253, Cri.P.C. is not the examination contemplated under Section 342, Cri.P.C. I have already stated that the Magistrate did not put to the accused the evidence of the P.Ws. in the said examination. The examination under Section 342 is intended for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.

5. On 23.12.1959, the Magistrate framed a charge, under Section 326, I.P.C. against the petitioner. The six Prosecution Witnesses, who had already been examined were then cross-examined for the accused and two other P.Ws. were also examined and cross-examined and then the prosecution closed its case. At that stage it was imperative on the part of the Magistrate to put questions to the

accused under Section 342, Cri.P.C. for the purpose of enabling him to explain the circumstances appearing in the evidence against him. The non-examination of the accused at that stage is not a mere irregularity which can be cured under Section 537, Cri.P.C. on the ground that such omission did not, in fact, occasion a failure of justice. The very fact of non-examination will amount to a failure of justice as it is a violation of the bounden duty of the Magistrate under Section 342 Cr.P.C. to question the accused for giving him an opportunity to explain the prosecution evidence against him and as it has thereby deprived the accused of the opportunity to explain the evidence against him.

6. Actually, I find that the Magistrate fixed 30.3.1960 for the examination of the accused and for taking the evidence of D.Ws. On 30.3.1960 he failed to examine the accused under Section 342 and he simply examined 2 D.Ws. Then, he proceeded to hear argument on 7.4.1960 and delivered his judgment on 14.4.1960 convicting and sentencing the petitioner under Section 323, I.P.C.

7. There is no doubt in my mind that the conviction of the petitioner cannot be allowed to stand in the face of the omission by this Magistrate to examine the petitioner under Section 342, Cr.P.C. This point was raised in appeal before the learned Additional Sessions Judge (II), He seemed to think that the non-examination of the accused under Section 342 was only a curable irregularity and that unless the accused was able to show that the said omission had prejudiced his defence the trial could not be said to be vitiated. In support of that proposition, he has relied on the decision in *Re: Subramanian Chettiar* : AIR1957 Mad442 . I have perused that decision. The said decision does not lay down any such startling proposition.

In that case, it was only vaguely suggested in the High Court that the accused had not been fully examined as required under Section 342. Actually, the High Court went through the examination of the accused and found that the circumstances appearing in the evidence against the accused had been put to him and that no fact had been used against him in regard to which he had not been given a chance to explain and that there was no disregard at all of the provisions of Section 342, Cr.P.C. resulting in grave prejudice to the accused vitiating the trial. In fact, the

High Court has stated that the counsel for the accused was not able to tell him of any other questions which ought to have been put. Thus, that was not a case of omission to examine the accused under Section 342. I fail to see how the learned Additional Sessions Judge could have relied on that decision for saying that the total failure to examine the accused under Section 342 could be cured under Section 537, Cr.P.C.

8. In the leading case on the subject, namely, *Tara Singh v. The State* : [1951]2SCR729 , their Lordships have stressed the importances of observing faithfully and fairly the provisions of Section 342. No doubt it was observed in that decision that every error or omission under Section 342 did not necessarily vitiate a trial, because errors of that type fall within the category of curable irregularities and that the question in each case deemed upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned.

It is clear therefore that in a case where there has been total failure to examine the accused under Section 342 and thus the accused has been deprived of the opportunity to explain the prosecution evidence which was going to be used to convict him, there has been total failure of justice and the trial must be held to have been vitiated. In *Tara Singh's case* : [1951]2SCR729 , the Sessions Judge in the examination under Section 342 had read out the statement made by the accused before the Committing Court, but failed to examine him on the evidence before the Sessions Court and it was held that it amounted to a non-compliance with the requirement of Section 342 and that it vitiated the trial and the conviction and sentence were set aside.

9. It has again been laid down in *Zwinglee Ariel v. State of Madhya Pradesh* : AIR 1954 SC15 , that circumstances appearing against the accused should not be considered unless an opportunity was given to him for explaining them in his examination under Section 342. Thus, where there has been a total failure to examine the accused under Section 342 Cr.P.C., it is not a curable irregularity at all. I may also refer to the decision *Machander v. State of Hyderabad* : 1955 CriLJ1644 , in which it was held by the Supreme Court that Judges and Magistrates must realise the importance of the examination under Section 342 and

that it was their duty to question the accused properly and fairly, bringing home to his mind in clear and simple language the exact case he has to meet and each material point that is sought to be made use of against him and affording him a chance to explain them if he can and so desires. Thus, it is clear that no accused can be convicted on the prosecution evidence adduced in a case unless he has been given a chance to explain the said evidence.

10. When I questioned the Assistant Government Advocate who appeared before me for the State, he said that he himself could not support the conviction in view of the failure of the Magistrate to question the accused under Section 342. He also informed me that before the Additional Sessions Judge he prayed that the case may be remanded, but that the learned Judge confirmed the conviction. Before me also the prayer of the Assistant Government Advocate was only to remand the case and he did not support the conviction of the petitioner. I am unable to understand how the Additional Sessions Judge could have dismissed the appeal in a case of this kind. There is no doubt in my mind that the trial has been vitiated by the total failure to examine the accused under Section 342.

11. The conviction and sentence of the petitioner are therefore set aside.

12. The question arises whether the case should be remanded. I have perused the evidence and the judgments of both the Courts. There were two eye witnesses P.Ws. 2 and 4. Both of them said that the two accused caused the injuries to P.W. 4. Still the Magistrate acquitted the 2nd accused and on the same evidence convicted the petitioner. He was clearly prejudiced by his cross-examination of the appellant before the framing of the charge. The appellate Court did not believe P.W. 2. Still on the evidence of P.W. 4 it confirmed the conviction. The result was that the appellant had to spend some days in jail before he could get bail. The petitioner has undergone enough suspense in this case and already suffered a few days in jail. Having regard to the circumstance of the case, I do not think it is necessary to remand the case for a further trial.