

Emperor Vs. Vishram Narayan Devli

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Court : Mumbai

Decided On : Mar-11-1930

Reported in : (1930)32BOMLR596

Judge : Mirza and ;Broomfield, JJ.

Appeal No. : Criminal Application for Revision No. 499 of 1929

Appellant : Emperor

Respondent : Vishram Narayan Devli

Judgement :

Broomfield, J.

1. There is a society in Bombay called the Nutan Marathi Hitavardhak Sangha, At a meeting of the society on October 14, 1928, there was a dispute between the President, S. D. Tandulkar, and the present petitioner V. N. Devli, who claims to be a member of the society but whose membership is disputed. Each of the parties filed a criminal complaint against the other. The President's complaint against the petitioner for offences under Sections 447, 504 and 506 of the Indian Penal Code was filed on October 19, 1928, and was heard and decided on November 13, 1929. The witnesses for the prosecution were examined and cross-examined; the accused (that is, the petitioner) was examined by the Court at some length under Section 342, Criminal Procedure Code; then the charge was framed;

the accused was asked if he wished to cross-examine the prosecution witnesses further and he said he did not; and lastly some defence witnesses, who were present in Court, were examined. The accused was represented by a pleader. It does not appear that further time for the defence was asked for, or that any objection was then raised to the case being disposed of in one sitting.

2. But Section 256 of the Criminal Procedure Code, as recently amended, appears to be intended to provide that there shall ordinarily be at least two hearings (of a warrant case). The accused is to be asked at the next hearing whether he wishes to recall any of the prosecution witnesses for further cross-examination. If the Magistrate thinks proper to put this question forthwith he is required to record his reasons for so doing. In the present case the Magistrate omitted to record his reasons. That is the first ground on which this Court is asked to revise the order of conviction of the petitioner. Reliance is placed on the decision of the High Court in *Emperor v. Lakshman* : (1929)31BOMLR593 .

3. In the second place it is contended that the examination of the accused under Section 342 ought to have been taken after the charge was framed, and that the omission to examine the accused again under that section is an irregularity which vitiates the trial. For that proposition reliance is placed on *Emperor v. Genu Gopal* : (1929)31BOMLR1134 .

4. I do not think there is any substance, in either of these contentions. It goes without saying, of course, that the provisions of the Code are meant to be strictly obeyed, and if they are disobeyed, and the disobedience results in any kind of injustice that will be a good ground for interference in revision. But Section 537 expressly provides that there shall be no interference in appeal or revision on account of any error, omission or irregularity which has not occasioned a failure of justice. In *Emperor v. Lakshman* the failure of justice was patent. The accused in that case had been called upon to state forthwith if they wished to cross-examine the prosecution witnesses. They applied for time as their pleader was absent. The Magistrate refused to grant them any time, and he also refused their request to be allowed to cross-examine the witnesses at the next hearing. That was very different from a mere omission to record reasons. The accused were denied a

privilege to which under the law they were clearly entitled. This case cannot, I think, be regarded as an authority for the proposition that any breach of the provisions of Section 256 necessarily involves the quashing of the proceedings. No doubt Mirza J. says at p. 598 : ' The provisions of Section 256 appear to us to be peremptory.' But the learned Judges who constituted the Bench were apparently in agreement, and Patkar J. says at p. 600:-

It would depend on the facts of each case whether the contravention of Section 256 of the Criminal Procedure Code amounts to a mere irregularity of procedure or to an illegality vitiating the trial.

That is in accordance with the view of other High Courts: King-Emperor v. Chhajju ILR (1926) All. 316 and Mussammal Ghasiti v. The Crown ILR (1925) Lah. 554. In Emperor v. Khushal : (1926)28BOMLR1026 our own High Court held that there is no universal rule that disobedience even of a mandatory provision of the Code has the consequence of nullification of all proceedings, irrespective of the question of prejudice. There is a ruling of the Rangoon High Court to the same effect in Nga Hla U v. King-Emperor ILR (1925) Ran. 139. (The Privy Council ruling in Subrahmania Ayyar v. King-Emperor ILR (1901) Mad. 61, 3 Bom. L.R. 540. applies only to the breach of a mandatory provision as to the mode of trial. There had been an illegal joinder of charges in that case. Section 256 does not deal with the mode of trial, but with the order of proceedings : see King-Emperor v. Chhajju, already cited, and Emperor v. Bechu Chaube ILR (1922) All. 124.

5. I do not see any reason to suppose that the accused in the case before us was prejudiced in any way by the Magistrate asking him forthwith if he wished to cross-examine further, or by the Magistrate's omission to record his reasons for this procedure. Apparently, if he had recorded his reasons, it would only have been necessary for him to say that the case was a simple and rather trivial one, that all the necessary evidence was available, and that nobody objected to the case being disposed of at once. It has been suggested to us that if there had been an adjournment the accused might perhaps have summoned some additional witnesses. But if he really wanted any more witnesses there was nothing to prevent him asking the Magistrate to summon them.

6. As to the objection in connection with Section 342, it is true that in *Emperor v. Genu Gopal Patkar J.* appears to have expressed the opinion that the proper stage for the compulsory examination of the accused under e. 342 is after the framing of the charge, But that expression of opinion was not necessary for the decision of the case. The examination of the accused had been merely perfunctory; they had not been given a proper opportunity of explaining the evidence against them. That circumstance in itself , was sufficient to vitiate the trial. But Wild J. held that, if the questions put to the accused had been such as to enable them to explain the circumstances appearing in the evidence against them, there would have been no contravention either of the spirit or letter of Section 342. The facts there wore similar to those of the present case, that is to say, the accused had been examined before the framing of the charge and there had been no further examination or cross-examination of prosecution witnesses. With, great respect I prefer the view taken by Wild J. Provided that the accused are examined after the evidence for the prosecution is completely closed, and before they are called on for their defence, I do not think it makes any difference whether the examination takes place before or after the framing of the charge. The provisions of the Code are sufficiently rigid already. It would be a mistake, in my opinion, to make them more rigid than they are by judicial interpretation. So far as my experience goes the general practice has always been that the detailed examination of the accused is taken before the charge. That some examination of the accused is intended to be made at that; stage appears to be indicated by the language of Section 254, ' when such evidence and examination have been taken and made.' If, after the framing of the charge, further evidence for the prosecution is put in, whether by the examination of additional witnesses or by further cross-examination of those already examined then Section 342 requires that there shall be a further examination of the accused, to give an opportunity for explaining that additional evidence. But if there has been a proper examination of the accused before the charge, and the prosecution case remains as it was without any addition, Section 342, I should say, does not require anything further. It is always open to the accused to make a further statement when called upon to plead under Section 255.

7. Even on the other view, that the accused in this case ought to have been examined again after the charge, the error or irregularity would certainly be curable under Section 537: Emperor v. Bechu; Nga Hla v. King-Emperor; Saiyid Mohiuddin v. King-Emperor ILR (1825) Pat. 488. But I do not think there was any error or irregularity.

8. I would discharge the rule.

Mirza, J.

9. The facts of the case which have given rise to this revision application are set out in detail in the judgment of my learned brother. The only two grounds urged on behalf of the applicant are: (1) that the Magistrate committed an illegality in proceeding forthwith with the trial after the charge had been framed without giving any reason in writing, a procedure which is in contravention of Section 256 of the Criminal Procedure Code; and (2) the Magistrate committed an illegality in not questioning the accused generally on the case after the charge had been framed, failure to do which, it is contended, amounts to a contravention of the provisions of Section 342 of the Criminal Procedure Code.

10. In support of the first contention, reliance is placed upon a ruling of this Court in Emperor v. Lakshmanm : (1929)31BOMLR593 , where the conviction was set aside because the provisions of Section 256 of the Criminal Procedure Code had not been followed in the trial. I was a party to that decision. The facts of that case, however, can be distinguished from the present case. In that case it clearly appears that the failure by the Magistrate to comply with the provisions of Section 256 had resulted in a prejudice to the accused. The accused's pleader was absent relying on the usual practice of the Court in such matters to adjourn the case after the charge is framed. The accused had applied for an adjournment and the Magistrate had refused the application. The accused were unable to further cross-examine the prosecution witnesses in the absence of their pleader. In the present case it has not been shown that any prejudice has resulted to the applicant owing to the Magistrate proceeding with the case forthwith after framing the charge. The applicant was represented by a pleader who raised no objection to the procedure

followed by the Magistrate. The applicant did not apply to the Magistrate for an adjournment on the ground that he wanted to summon more witnesses to give evidence on his behalf or any other ground. It is not every failure to comply with provisions of the Criminal Procedure Code, which, although peremptory in form, would vitiate a trial apart from it being shown that such failure has prejudiced the case of the accused. Section 537 of the Criminal Procedure Code seems to me to be comprehensive enough to cover a case like the present where although an error or irregularity is shown to have taken place in the procedure followed by the Magistrate, yet it does not appear that such error or irregularity has occasioned a failure of justice.

11. In *King-Emperor v. Ohhajju* ILR (1926) All. 316 Kendall J, was of opinion that the provisions in Section 256, Criminal Procedure Code, were not provisions relating to the mode of trial, and that failure to follow those provisions would strictly amount to no more than an irregularity in procedure, and would not be a ground for setting aside the conviction, unless the irregularity had occasioned a failure of justice. The facts of the case in *King-Emperor v. Chhajju* were similar to those with which we have here to deal. The Magistrate had not recorded reasons for proceeding with the trial forthwith after the charge had been framed. The learned Judge remarks (p. 318):-

It appears to be clear enough that the accused did not wish to re-summon any witness, for, when they were represented by counsel on the 19th of May, the witnesses were not re-summoned, as I have no doubt they would have been had any application been made on behalf of the accused. There has been no failure of justice on account of the irregularity.

12. In *Mussammat Ghasiti v. The Crown* ILR (1925) Lah. 554 Shadi Lal C. J. has held that provided there has been no consequent failure of justice, the Magistrate's omission to record his reasons for requiring the accused, at the same hearing as that at which the charge was framed, to state whether they wished to cross-examine the prosecution witnesses, would not render the trial illegal. He has further held that the provision contained in Section 256 of the Criminal Procedure Code is not mandatory, but merely directory. In that case it was found that the

omission by the Magistrate to record the reasons had not caused any prejudice to the accused and the irregularity in the procedure was considered to be cured under Section 537 of the Criminal Procedure Code.

13. It is clear in my judgment that no prejudice having resulted to the applicant by the failure of the Magistrate to comply with the provisions of Section 256, the objection taken under the first head fails.

14. On the second point, namely, the illegality or irregularity alleged to have taken place in not complying with the provisions of Section 342, the applicant has relied upon certain observations of Mr. Justice Patkar in *Emperor v. Genu Gopal* : (1929)31BOMLR1134 . In dealing with the latter part of Section 342, the learned Judge has remarked that the stage for calling upon the accused to explain the circumstances appearing in the evidence against him. would be reached when after the charge is framed the accused either declines to cross-examine the prosecution witnesses, or when he expresses a wish to cross-examine the witnesses the cross-examination and re-examination are finished, and the evidence of the remaining witnesses for the prosecution taken. But that expression of opinion was not necessary for the decision of the case and was not shared by Mr. Justice Wild who delivered a separate but concurring judgment. Mr. Justice Wild remarks (p. 1143):-if the learned Magistrate had questioned the applicants generally on the case on November 1, for the purpose of enabling them to explain the circumstances appearing in the evidence against thorn, his failure to question them again after their refusal to cross-examine the prosecution witnesses would not have been contrary to the provisions of S. 342.

15. The Magistrate in that case had questioned the accused before framing the charge. With great respect I follow the view expressed by Mr. Justice Wild on this point in preference to that expressed by Mr. Justice Patkar. The latter part of Section 342, Clause (1), lays down that the Court shall question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. It would be permissible under this section, in my opinion, for such examination of the accused to be after the witnesses for the prosecution are examined but before the charge is framed and

the accused called on for his defence. The Magistrate, in my opinion, has not committed any irregularity in recording the accused's statement before framing the charge. I may state here that the applicant's petition did not set out the second ground in clear or explicit terms. Ground No. 2 taken in the petition which relates to this point only states : 'The statement of the accused has not been properly recorded '. We have, however, heard arguments on the point and are satisfied that there has been no illegality or irregularity in the procedure under this head which can be said to vitiate the trial.

16. I agree that the rule should be discharged.

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