

Emperor Vs. Babaji Girgauda

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SooperKanoon Citation : sooperkanoon.com/330680

Court : Mumbai

Decided On : Mar-13-1907

Reported in : (1907)9BOMLR366

Judge : Chandavarkar and ;Pratt, JJ.

Appeal No. : Criminal Application for Revision Nos. 319, 338 and 339 of 1906

Appellant : Emperor

Respondent : Babaji Girgauda

Judgement :

Chandavarkar, J.

1. It was irregular on the part of the Magistrate before whom the applicants, now before us, were tried, to have used as evidence the statements made by the witnesses to the Chief Constable during the Police investigation, without complying with the provisions of the law. Section 162, Criminal Procedure Code, lays down that 'no statements made by any person to a police officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence'; and it also provides 'that when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and may then, if the Court thinks it expedient in the

interests of justice, direct that the accused be furnished with a copy thereof and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act, 1872.' Here neither the section cited nor the Evidence Act was borne in mind by the Magistrate. The way in which the Magistrate made use of the statements made before the Chief Constable was this. He acquitted those of the accused before him whose names had not been mentioned by any of the witnesses to the Chief Constable during the Police investigation. It is contended before us by the learned Counsel for the complainant and the learned Sessions Judge whose judgment in appeal is now before us in revision is of opinion, that the accused whom the Magistrate convicted were not prejudiced by the irregular procedure adopted. But the prejudice is clear when as a result of the perusal of the statements made to the Chief Constable, some of the accused were acquitted because their names did not appear in them and the rest were convicted. The necessary inference is that as to the latter the Magistrate was influenced by the fact that the statements of the witnesses examined before him were corroborated by the statements made before the Chief Constable, whereas the law directs that they cannot be used in evidence unless they are admitted in accordance with the provisions of the Indian Evidence Act and of the Criminal Procedure Code. Here the accused had never any opportunity of cross-examining any of the witnesses for the prosecution as to those statements.

2. In his appellate judgment the learned Sessions Judge admits the irregularity, but as we have already pointed out, he seems to be of opinion that the said irregularity could not have prejudiced the accused whom the Magistrate convicted. For the reasons given we are of opinion that the accused were prejudiced and having regard to the explanation to Section 537 of the Code of Criminal Procedure, we are bound to presume under the circumstances of this case that there was a failure of justice, so far as the trial before the Magistrate was concerned.

3. Then the question is whether there is an error of law or any exceptional circumstance to call for our interference with the decision of the learned Sessions Judge under our revisional jurisdiction.

4. That Judge has no doubt confirmed the conviction relying on the evidence of the witnesses for the prosecution independently of the statements made by those witnesses to the Police; and having regard to the practice of this Court, under ordinary circumstances we should accept his conclusion based on his appreciation of the evidence. But here, as we have pointed out, the learned Sessions Judge starts by an erroneous view of the effect of the irregularity of the Magistrate so far as the applicants are concerned. The statements having been used by the Magistrate it is only fair that the applicants should have an opportunity of cross examining the Chief Constable and the witnesses for the prosecution on those statements. It was the Magistrate who saw the witnesses who gave evidence against the accused and had therefore an opportunity of watching their demeanour. And when he convicted some of the accused after referring to the Police statements, he must be taken to have relied upon those statements as to the accused whom he convicted, as corroborative statements. Whether in the absence of those statements the Magistrate would have relied upon the evidence of the witnesses for the prosecution recorded, if it stood alone, is not clear. Under these circumstances we think we should not accept the learned Sessions Judge's finding. Upon the whole the proper order to pass is that the conviction and sentence are set aside and the Magistrate is directed to retry the case. At such retrial the Chief Constable should be examined as to the statements made to him by the witnesses during the Police investigation and the applicants if they desire should be permitted to cross-examine the witnesses as to those statements. The Magistrate should thereupon decide the case against each of the applicants upon the evidence now on the record and the evidence of the Chief Constable to be recorded in accordance with the directions herein contained. If the Magistrate find any of the applicants guilty, in sentencing them he should take into consideration the sentences they may have already undergone. The applicants' Counsel asks that they should be allowed to adduce additional evidence before the Magistrate in defence. It is not necessary for us to give any such direction to the Magistrate. If any application is made to the Magistrate by the applicant for permission to adduce additional evidence for the defence, it will be for the Magistrate to dispose of it according to law. The witnesses who have been already examined should not be examined de nova except as directed above.

