

State Vs. Iris Chandrabala Premnath

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Court : Mumbai

Decided On : Aug-24-1954

Reported in : AIR1955Bom45; (1954)56BOMLR1113; 1955CriLJ125; ILR1955Bom171

Judge : Dixit and ;Vyas, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 211(2), 342, 362, 362(1), 362(4), 423, 435 and 439; Bombay Prevention of Prostitution Act, 1923 - Sections 3

Appeal No. : Criminal Revn. Appln. No. 670 of 1954

Appellant : State

Respondent : iris Chandrabala Premnath

Advocate for Pet/Ap. : Party in person, ;S.B. Bhasme, Adv. appears as amicus curiae and ;H.M. Choksi, Govt. Pleader

Judgement :

Dixit, J.

1. This revisional application has been referred to a division bench by Mr. Justice Gajendragadkar in consequence, we are informed, of Mr. Justice Shah's decision which has been reported in -- 'Naran Velji v. Ranjitsingh', : AIR1955 Bom42 . The

question raised is one under Section 362(4), Criminal P. C. It is one of frequent occurrence and, therefore, is of some importance.

2. The facts of the case in which the questionarises are simple. The applicant was 'prosecuted before the Additional Chief Presidency Magistrate, 3rd Court, Bombay, for an offence of soliciting persons in a street for the purpose of prostitution under Section 3(b), Bombay Prevention of Prostitution Act, 1923. Section 3, so far as material, provides :

'Whoever in an street or public place or place of public resort or within sight of and in such manner as to be seen or heard from any street or public place, whether from within any house or building or not--.....

(b) solicits or molests any person or loiters for the purpose of prostitution, or carnal intercourse or any act of gross indecency, shall be punished with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees or with both.'

In support of the prosecution case three witnesses, viz., head constable No. 1006/K, Police constable No. 7690/K and one Rambhau Genoji who is said to be a fruit merchant at Crawford Market, were examined on 19-5-1954. On 27-5-1954, the statement of the accused was recorded under Section 342, Criminal P. C. Then on 31-5-1954, five witnesses, viz., Bhimaji Janapur, Superintendent Of Police, 'A' Division, Sorab Hormasji Kanga, Inspector of Police, Vigilance Branch C.I.D., Sorab Bheramsha Hormusji, Sunderdas Kashiramarid John Frederick Errington were examined and thereafter the case stood adjourned for judgment on 2-6-1954.

3. The learned Magistrate considered that the case for the prosecution was proved by the evidence of two police witnesses supported as it was by the evidence of Rambhau. He disbelieved the defence case which was that on the day in question at about 2-30 p.m. the accused was going to buy her rations and while she was passing between the Leopold Hotel and Imperial Stores, two men suddenly came from the opposite direction, lifted her and put her into a taxi. The learned Magistrate considered that the story of the accused was a cock and bull story,

similarly, he disbelieved the defence evidence and pointed out that, at any rate, the evidence of Sorab Hormusji Kanga would go to support the prosecution case. In the result, he convicted the applicant of the offence charged against her and sentenced her to suffer simple imprisonment for one day and to pay a fine of Rs. 100 or in default to suffer simple imprisonment for one month. From the order of conviction and sentence the accused has come up in revision.

4. The applicant has appeared in person and Mr. Bhasme has argued the case in order to assist the Court as 'amicus curiae' for which we are indebted. The learned Government Pleader has contended that the order of the Court below is correct. Mr. Justice Shah, while granting rule, made a note, viz., 'the Magistrate has maintained no record of the evidence'.

5. The question for decision is whether in this case the learned Magistrate was bound to record the evidence of the witnesses for the prosecution as well as for the defence. The question turns upon the proper construction of Section 362(4) which provides that;

'In cases other than those specified in Sub-section (1), it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge.'

Now, it is necessary to refer to Section 362(1) which provides :

'In every case tried by a Presidency Magistrate in which an appeal lies, such Magistrate shall either take down the evidence of the witnesses with his own hand, or cause it to be taken, down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.'

Section 362(1), therefore, shows that in a case tried by a Presidency Magistrate in which an appeal lies, the Magistrate is bound to take down the evidence of the witnesses either himself or cause it to be taken down in writing at his dictation, while in cases other than those specified in Sub-section (1), Section 362(4) shows that the Magistrate is not required to record the evidence. Section 362, before its amendment in 1923, was composed of three sub-sections of which Sub-section'

(1) ran as follows :

'In every case in which a Presidency Magistrate imposes a fine exceeding two hundred rupees, or imprisonment for a term exceeding six months, he shall either take down the evidence of the witness with his own hand or cause it to be taken down in writing from his dictation in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record'.

There was no provision in Section 362 similar to the provision contained in Sub-section (4) of Section 362 after its amendment. Sub-section (4) of Section 362 was added by Act 18 of 1923. The applicant contends that this is a case in which evidence should have been recorded by the Magistrate and her point of view has been argued by Mr. Bhasme as 'amicus ' curiae'. The learned Government Pleader, on the other hand, contends that it is a matter for the Presidency Magistrate to consider whether or not he should record the evidence, and if he comes up with the conclusion that he should not, he is not obliged to do it merely because it may be desirable to do so.

6. In this case what the learned Magistrate did was to mention the name of each witness as he gave evidence but did not in fact record the evidence of the witness. Now, Mr. Bhasme's argument receives support from Mr. Justice Shah's decision in -- 'Naran Velji's case (A)'. The first part of the head-note in that case is as follows :

'Section 362(4) of the Criminal Procedure Code, 1898, does not confer upon a Presidency Magistrate an arbitrary license to record or not to record evidence according as he pleases. The discretion required to be exercised by a Presidency Magistrate under Section 362(4) of the Code must be a judicial discretion.'

And the point for decision is as to what is the true construction of Section 362(4). In this connection several cases have been cited at the bar. The first of these is a decision of this Court reported in -- 'Emperor v. Harischandra', 10 Bom LR 201. It may be noted that that case was decided before the amendment of Section 362 in 1923. In that case the applicant was charged with committing the offences of insult and assault and was convicted and sentenced by a Presidency Magistrate to pay a fine of Rs. 15. The petitioner applied to the High Court and it was observed :

'Section 353 of the Criminal Procedure Code does not mean that a Presidency Magistrate can act arbitrarily and record nothing by way of evidence in cases in which he is not bound to take down evidence in the manner prescribed in the section. In such cases the section merely gives him a discretion to take down the evidence or not, and the discretion should be exercised judicially in a reasonable spirit and not arbitrarily. There may be no necessity to record any evidence in 'morning cases'. But where a respectable person is charged with an offence reflecting on his character and serious allegations are levelled against him, there ought to be some record of evidence to enable him in case of conviction to go to the High Court'.

Now, Section 362 (1), as it was before its amendment, required a Presidency Magistrate either to take down the evidence of the witnesses himself or cause it to be taken down in writing from his dictation in cases in which a Presidency Magistrate imposed a fine exceeding Rs. 200, or imprisonment for a term exceeding six months. Section 362 (1) did not provide as to what the Magistrate was to do in cases other than those referred to in Section 362 (1). But this Court construed Section 362 (1) as implying that a Presidency Magistrate acting, under Section 382 cannot act arbitrarily and record nothing by way of evidence in cases in which he is not bound to take down evidence in the manner prescribed in the section. In effect, therefore, what the decision says is that in cases not covered, by Section 362 (1), a Presidency Magistrate has a discretion to take down the evidence and that the discretion should be exercised judicially, and in cases where the offence is one which reflects upon, a person's character, there ought to be some record of evidence.

7. Mr. Bhasme has also strongly relied upon this decision. Mr. Bhasme then relies upon a decision of this Court reported in -- 'Mahomed Roshan v Emperor', AIR 1925 Bom 147. But it is clear that the observations in that, case are 'obiter'.

8. The next case to which reference has been made is a case reported in -- 'Hanifabai v. Md. Yakub', AIR 1931 Bom 142. That was a maintenance proceeding and it was observed, by Mr. Justice Madgavkar at p. 143 that:

'....Section 362 (4) would apply to a maintenance proceeding and it is incumbent upon a Presidency Magistrate to record evidence'.

It appears that the case in -- 'Emperor v. Harischandra', (B), was referred to and followed. It maybe noted that this case was depided after the amendment of Section 362 in 1923.

9. These three cases upon which Mr. Bhasme has relied have not been approved in subsequent decisions to which reference will now be made. The first of these is a decision of this Court reported in -- 'In re Chhagan Hargovan', AIR 1932 Bom 179. That also was a case of a maintenance proceeding and with respect to -- 'Hanifabai's case', (D), this is what Sir John Beaumont C. J, said (p. 180):

'....I confess I feel some difficulty in seeing, what justification there is for this Court interfering with the manner in which a Presidency Magistrate chooses to conduct his business within-the law. If we are right in holding that he was not bound to record the evidence under the Code, I do not quite follow on what ground we can say that he ought to have recorded the evidence'.

Then there is another decision in the same volume which is reported in -- 'D'Souza v. Emperor', AIR 1932 Bom 180. With respect to the construction of Section 382 (4) this is what Sir John Beaumont said (p. 181):

'....Section 362 is perfectly plain; It says that in cases which are not appealable it shall not be necessary for a Presidency Magistrate to record the evidence. There is no distinction drawn between what the learned Judges refer to as 'morning cases' and any other cases. Nor is any distinction drawn between charges against people occupying a respectable status in life and people who occupy some other status. Nor in terms has any discretion been conferred upon the Magistrate. It is no doubt true that in onesense he has a discretion, because it is not illegal for him to record evidence if he likes to do so But his right to refuse to record evidence is, in my opinion, absolute, and as long as the case falls within the cases excepted under Section 362 (4), the Magistrate is not bound to record the evidence, and this court has no jurisdiction to require him to do what the statute says it is not necessary for him to do. If he likes to record the evidence, that is another matter; &

probably if he was hearing a case which involved a question of serious consequence to the accused, and the accused asked him to make a record of those portions of the evidence on which he wished to rely on an application in revision, the Magistrate would in a proper case comply with that request. But in my opinion the exercise of any such discretion would be 'ex gratia', and not subject to review in this Court'.

And then at page 181 he referred to the case of-- 'Emperor v. Harischandra', (B) and observed that that case was decided according to the wording of Section 362 which was in different terms to those in which it is now expressed. With respect to that decision and other subsequent decisions he said (p. 181):

'....But the decision has been acted upon to my knowledge in more recent cases, and I think it desirable to express the view that the decision was not justified by the terms of the Code, either as it existed then or as it now exists. This Court is not justified in following a decision which is opposed to the plain words of a statute'.

This case, therefore, shows that the division bench consisting of Sir John Beaumont and Mr. Justice Broomfield did not accept as correct the view taken in -- 'Emperor v. Harischandra', (B) and-- 'In re Hanifabai', (D)

10. The next case to be referred to is a full bench decision reported in -- 'P.D. Shamdasani v. H.P. Mody', : AIR1944 Bom129 . With respect to the earlier cases, the full bench did not follow the cases in -- 'Emperor v. Harischandra', (B) and-- 'In re Hanifabai (D)', but the full bench seemed to prefer the two cases reported in -- 'In re Chhagan Hargovan (E)', and 'D'Souza v. Emperor', (F). In that full bench case Macklin, J. who delivered the judgment of the Court,' observed (p. 130):

'....We have no doubt that it would be wrong to interfere in this case, since the discretion of the Magistrate has been judicially exercised. His report shows that he has fully considered the matter, and he has given full reasons for trying it summarily'.

It may be pointed out that that was a case in which there were forty-one hearings and the Magistrate had not recorded any evidence throughout.

11. The last case to be mentioned is the judgment of Shah J. The reasons for the decision are, with respect, cogent because this is what the learned Judge says (p. 43) :

'....In a case which is so simple that it may be disposed of without any delay and on evidence which can be finished at a single hearing, a Magistrate may be justified in not maintaining record of evidence. But where either substantial questions of law or of appreciation of evidence arise or adjournments are necessitated and evidence of witnesses is heard after long intervals, a Magistrate would not normally be justified in refusing to maintain any record of evidence of the witnesses examined or to make a memorandum of the substance of the examination of the accused.'

Then at the same:

'.....Failure to maintain a proper record of the evidence in a case where some substantial question of law or of fact arises, or where the case has to be adjourned several times and evidence of different witnesses has been heard after long intervals, would in effect deprive this Court of its right' to exercise its revisional jurisdiction'.

Shah, J. considered that although Section 362 was worded differently before 1923, what was implicit in Section 362 before its amendment was made explicit after the amendment of the section in 1923 and he preferred to follow the earlier decision of this Court in -- 'Emperor v. Harischandra', (B), and did not feel persuaded to accept the view of Sir John Beaumont in -- 'D'Souza v. Emperor', (P). With respect, I am unable to accept the view taken in --'Emperor v. Harischandra', (B). In the first place, that case was decided before the amendment of Section 362 in 1923, and, secondly, in view of the fact that the case in -- 'D'Souza v. Emperor', (P) was decided after the amendment of Section 362 in 1923, it seems to me that this decision lays down the correct principle.

Section 362 (4) does not, in terms, give a discretion to a Presidency Magistrate, though as observed by Sir John Beaumont, in a sense, Section 362 (4) gives him a discretion. Now, Section 362 (4) does not require a Presidency Magistrate to

record evidence in cases not covered by Section 362 (1). A Magistrate under Section 362 (4) has a right to refuse to record evidence, and in my view, it is not at all a case of discretion properly so-called. If the question was one of discretion, the language of Section 362 (4) would have been different. The meaning of Section 362 (4) is that a Presidency Magistrate is not required to record evidence in cases not covered by Section 362 (1). It is undoubtedly a matter for him to decide and his view of the matter would not, I think, be open to a review by the High Court. If he chooses not to record evidence, he is within his rights. If he chooses to record evidence, he is not acting illegally. But the question is one entirely for him to decide and I am unable to see as to how the question of discretion comes in at all.

This is not to suggest that it would not be desirable for a Presidency Magistrate to record evidence even in cases not covered by Section 362 (1). It may be that a Presidency Magistrate has to deal every day with a number of cases. A particular case may go on for a number of days and there may be a number of witnesses examined in the case. In such a case, it would be straining the memory of a Magistrate too much if he does not maintain a record of the evidence in the case. A Magistrate may have an excellent memory and a Magistrate may have a weak memory and an experienced Magistrate would normally keep some record of the evidence in cases in which he would feel that a record ought to be kept. But that is no ground for saying that in such a case he ought to keep a record of the evidence.

Again, where the case is a simple one and does not last for more than a few hearings, a Magistrate may well be justified in trusting his memory either with a few private notes or with no notes at all. In cases of a complicated nature a Magistrate of experience would normally keep a record. But I am unable to accept the view that once the Magistrate has exercised the right conferred upon him by the law, then that is subject to a review by the High Court. This is not to suggest that if the High Court feels that an injustice has been done, the High Court has no power to interfere with the order of the Magistrate. The powers of the High Court in its revisional jurisdiction are contained in Section 439, as also in Section 435 and those powers are similar to those exercisable by a Court of Criminal appeal under Section 423.

12. Here, the case is of a simple nature, though the charge is a serious one. The interval between the commencement of the recording of the evidence and the date of delivery of judgment is not more than 14 days. In all, five witnesses have been examined and I am not prepared to say that in such a case the Magistrate would not be able to decide the case without keeping a record of the evidence in the case. In my opinion, therefore, the true view is that under Section 362 (4) a Presidency Magistrate has a right to refuse to record evidence, and once the Magistrate decides in a particular way, his decision is not subject to a review by the High Court. In taking this view I am supported by the decision of Sir John Beaumont in --'D'Souza v. Emperor', (F), with which I respectfully agree. While, therefore, I agree with Shah, J. about the desirability of recording evidence even where a Presidency Magistrate is not required to do so, I am unable, with respect, to concur with him in the construction of Section 362 (4). I am inclined to agree with the construction of Section 362 (4) as put by Sir John Beaumont C. J. in --'D'Souza v. Emperor', (F).

13. On the facts of this case, however, I am disposed to interfere with the order of the Court below. The charge against the applicant was of a serious nature. If proved, it reflected seriously upon the applicant's character. In support of the prosecution story, there was the evidence of two police witnesses and the principal reason as to why the Magistrate accepted the police evidence was that it was supported by the evidence of Rambhau Genoji. Now, Rambhau Genoji is said to be a fruit merchant at Crawford Market. His evidence was that about 2-30 P. M. he had gone to the Colaba area to recover his dues and while he was standing upon a footpath waiting to meet a person, he saw the accused approaching the head constable.

He says that he heard the conversation which was going on between the accused and the head constable. Now, a person who is standing upon a footpath waiting to meet another person, can hardly be attentive to a conversation going on between two other persons.

Besides, the statement of Rambhau Genoji was recorded by the police not on 1-4-1954, but on 3-4-1954. It seems to me that witness Rambhau Genoji is a chance

witness, and I am not prepared to rely upon his evidence. If the evidence of this witness is not accepted, what remains is the evidence of two constables. But it will not be safe to rely upon the evidence of the two constables in the case of a serious offence like the present one.

The learned Magistrate no doubt relied upon the evidence of Inspector Kanga, but that evidence seems to me to be not at all satisfactory. In his evidence he referred to a previous occasion when he saw the accused going in the company of girls known to be of loose character. On another occasion he saw the accused, a man and a girl going in an omnibus from the V. T. towards Colaba, that the man and the girl got down near the Regal Cinema and that the accused got down at the next stop. This evidence has hardly any value upon the incident which occurred on 1-4-1954.

14. Although, therefore, the learned Magistrate was right in not recording the evidence of the witnesses for the prosecution and for the defence, he was, in the circumstances of this case, wrong in convicting the accused of the offence charged.

15. The application will, therefore, be allowed, the order of conviction and sentence set aside and the accused acquitted and discharged. The fine if paid, should be refunded to the applicant.

Vyas, J.

16. I agree with my learned brother.

17. The question before us is one of construction of Sub-section (4) of Section 362, Cr. P. C., namely, whether this sub-section requires a Presidency Magistrate to exercise his discretion in the matter of recording evidence in the trial of non-appealable cases. Shah J. has held in-- : AIR1955 Bom42 , that Section 362 (4), Criminal P. C., 1898, does not confer upon a Presidency Magistrate an arbitrary license to record or not to record evidence according as he pleases and that the discretion required to be exercised by a Presidency Magistrate under Section 362(4) of the Code must be a judicial discretion, and he has observed that where

either substantial questions of law or appreciation of evidence arise or adjournments are necessitated and evidence of witnesses is heard after long intervals, a Magistrate would not normally be justified in refusing to maintain any record of evidence of the witnesses examined or to make a memorandum of the substance of the examination of the accused.

These observations are undoubtedly entitled to considerable weight, but with great respect I am unable to agree with the view of Shah J. To hold that the decision in -- 10 Bom LR 201, is still good law is to say that even after the enactment of Sub-section (4) by the amendment of 1923, the position regarding whether a Presidency Magistrate is required to record evidence in non-appealable cases has remained the same as it was before Sub-section (4) was put on the statute book. That substantially is the view taken by Shah J. but with very great respect it does not appear to be a correct view. Under Section 362 as it stood before Sub-section (4) was added to it, there was an obligation expressly laid upon a Presidency Magistrate that he must maintain a record of evidence in appealable cases. But so far as non-appealable cases were concerned, the section did not make any provision on the subject, thus apparently requiring the Magistrate to use his own discretion in the matter. When Sub-section (4) was enacted and added to Section 362, a statutory right was conferred upon a Presidency Magistrate that he was absolutely free to refuse to record evidence in non-appealable cases, and if he did exercise that right and did not record evidence in a non-appealable case, no superior Court could interfere with the said exercise of that right.

The view taken by Shah J. postulates that even after the enactment of Sub-section (4), there is a discretion left in a Presidency Magistrate and he is required to exercise that discretion before he can refuse to record evidence. Now, it is true that there is a difference between the words, say, 'it shall not be necessary for a Presidency Magistrate to record evidence' and the words, for instance, 'a Presidency Magistrate shall not record evidence', and to the extent to which there is the difference between the two expressions, it may be said that in a limited sense, there is a discretion in a Presidency Magistrate under Sub-section (4) of Section 362, namely that he may record evidence if he chooses to do so even in a non-appealable case. Except in this limited sense, Sub-section (4) does not

envisage any discretion in a Presidency Magistrate. It was this legal position which was made clear by Chief Justice Beaumont in -- AIR 1932 Bom 180, when he said (p. 181):

'....Nor in terms has any discretion been conferred upon the Magistrate. It is no doubt true that in one sense he has a discretion, because it is not illegal for him to record evidence if he likes to do so.'

It is true that in -- 'Lalbhai Tricamlal v. Municipal Commr. of Bombay', 10 Bom LR 821, Mr. Justice Macleod quoted certain observations from a decision in -- 'Passkall v. Passmore', 15 Pa St D 304 (D), and the observations were ;

'The very term (i.e. discretion) itself standing and unsupported by circumstances imports the exercise of judgment, wisdom, and skill as contra-distinguished from unthinking folly, heady violence or rash injustice.'

It is also true that in -- 'Morgan v. Morgan & Porter', (1869) 1 P & D 644, the learned Judge held that the discretion to be exercised under Section 31 of the statute which he was considering and construing should be a regulated discretion and not a free option subordinated to no rules. He observed that the discretion was probably reposed in the Court because the Legislature found it impossible to foresee and specify the classes of cases fit for its application which might arise under the new law, and he said that the duty of reducing its exercise to method devolved upon the Court. It must, however, be stated at this Juncture that we have not got Section 31 of 20 & 21 Vic. c. 85 before us and so we do not know how the language of that section would compare with the language of Sub-section (4) of Section 362, Criminal P. C. So, for construing Sub-section (4) of Section 362, we cannot turn to the construction of Section 31 of 20 and 21 Vic. c. 85.

In short the observations in the English cases of -- 'Passkall v. Passmore (I)' and -- 'Morgan v. Morgan (J)', will not be apposite in the present context, because here we are concerned with Sub-section (4) of Section 362, Criminal P. C. and this Sub-section, as the learned Chief Justice pointed out in. -- 'D'Souza v. Emperor (F)', does not in terms confer any discretion upon a Magistrate. So, the English cases construing the term 'discretion' are not strictly to the point.

18. The weight of the judicial decisions of this Court is definitely in favour of the view that in non-appealable cases a Presidency Magistrate cannot be compelled to record evidence, since he has got an absolute right vested in him by the statute to refuse to record evidence in such cases. It is true that in -- 'Emperor v. Harischandra (B)', it was held that Section 362 of the Criminal Procedure Code did not mean that a Presidency Magistrate could act arbitrarily and record nothing by way of evidence in cases in which he was not bound to take down evidence in the manner prescribed in the section. This decision went on to say that the section merely gave the Magistrate a discretion to take down the evidence or not and that the discretion should be exercised judicially in a reasonable spirit.

It is to be noted however that -- 'Emperor v. Harischandra (B)', was decided before Sub-section (4) of Section 302 was put on the statute book, and that would make all the difference in the legal position, whether any discretion is conferred by the statute as it stands now upon a Presidency Magistrate to record the evidence or not in non-appealable cases. Commenting upon this decision, Chief Justice Beaumont observed in -- 'D'Souza v. Emperor (F)', that the learned Judges who decided that case were usurping the functions of the Legislature when they said that in cases of petty offences such as 'nuisances' or what are called in police parlance 'morning cases', there might be no necessity to record any evidence, but that in a case where an educated man holding a comparatively respectable status in life was charged with an offence reflecting on his character and serious allegations were levelled against him, there ought to have been some record of evidence to enable him in a case of conviction to go up to the High Court in revision and satisfy the High Court that the conviction was wrong. The learned Chief Justice said in effect that in enacting Section 362 the Legislature did not draw any distinction between what the learned Judges in -- 'Emperor v. Harischandra (B)', referred to as 'morning cases' or other cases.

19. Then again it is true that in -- AIR 1931 Bom 142, it was held that where a Presidency Magistrate could not finish the case at one hearing, and had to put off the decision for a considerable time, he should in the exercise of his discretion record notes of evidence. In the body of the judgment in this case, Madgavkar J. approvingly referred to -- 'Emperor v. Harischandra (B)', and observed that under

Section 362 Presidency Magistrates had a discretion, judicial and not arbitrary, and it was necessary for them to consider the evidence judicially. He went on to say (p. 143) :

'.. But without in any way disparaging the experience and capacity of the learned Magistrate, it is impossible to expect him to remember on June 13, the evidence which he had omitted to record on March 5, with the hundreds of other cases he must have tried in the interval. Neither the law nor this Court places such an unreasonable burden on Presidency Magistrates; rather as pointed out in -- 'Emperor v. Harischandra (B)', in a summary trial, which is likely to be adjourned for a long date, it is difficult for the Magistrate to remember the evidence, the appreciation of which it is necessary for him to make without a sufficient memorandum to enable him on a subsequent date to write a proper judgment. In this case, unfortunately, both the evidence and this order are lacking.'

Barlee J. also who delivered a concurrent judgment said that when it appeared to a Presidency Magistrate that he could not finish the case at one hearing and he found that he was obliged to put off the decision for a considerable time, he should in the exercise of his wide discretion make notes so as to enable him at the time of judgment to remember what evidence had been recorded. Thus, notwithstanding the existence of Sub-section (4) on the statute book, the decision in -- 'In re Hanifabai (D)', accepted the principle laid down in -- 'Emperor v. Harischandra (B)', that Section 362, Criminal P. C. required a Presidency Magistrate to exercise his discretion in the matter of recording evidence in non-appealable cases and that if in certain types of cases evidence was not recorded or memorandum of evidence was not kept by the Magistrate, there was failure to exercise the discretion judicially.

20. This decision, however, was expressly disapproved by a division bench of this Court consisting of Beaumont C. J. and Broomfield J. in --AIR 1932 Bom 179. Dealing with a contention which was advanced on the authority of the decision in -- 'In re Hanifabai (D)', that if the Magistrate was not bound to record evidence, he ought at any rate to have done it and that the High Court ought to order him to do it as the High Court had done in the case of -- 'In re Hanifabai (D)', the learned

Chief Justice delivering the judgment of the bench said (p. 180):

'..I confess I feel some difficulty in seeing what justification there is for this Court interfering with the manner in which a Presidency Magistrate chooses to conduct his business within the law. If we are right in holding that he was not bound to record the evidence under the Code, I do not quite follow on what ground we can say that he ought to have recorded, the evidence'.

Then again, the view taken in -- 'In re Hanifabai (D)', did not find favour with this Court in -- 'D'Souza v. Emperor (F)', where also the learned Chief Justice said with disapprobation that the decision in -- 'Emperor v. Harischandra (B)', had been acted upon in more recent cases, apparently hinting at -- 'In re Hanifabai (D)', and the learned Chief Justice thought it desirable to point out that the decision in -- 'Emperor v. Harischandra (B)', was not justified by the terms of the Code either as it existed at the date of the said decision, or as it existed at the date of the decision in -- 'In re Hanifabai (D)'. He went on to say in terms that the High Court was not justified in following the decision, namely the decision in -- 'Emperor v. Harischandra (B)', which was opposed to the plain words of the statute.

21. The decision in -- 'In re Hanifabai (D)', was not accepted as a correct one by the full bench of this Court in -- : AIR1944 Bom129 , where the full bench just referred to it only to cite two later cases, --- 'In re Chhagan Hargovan (E)' and -- 'D'Souza v. Emperor (F)'; and follow those cases. It is true that in -- AIR 1925 Bom 147, it was pointed out by Marten and Fawcett JJ. that even in cases falling under Sub-section (4) of Section 362, the discretion which was allowed to a Presidency Magistrate not to record any evidence should be exercised reasonably as had been pointed out by the High Court in --'Emperor v. Harischandra (B)'. It is to be noted however that -- 'Mohomed Roshan v. Emperor (C)', was an appealable case where the recording of evidence was governed by Sub-section (1) of Section 362 of the Criminal P. C. Clearly, therefore, the abovementioned observations of the learned Judges in respect of Sub-section (4) of Section 362 were 'obiter' and with respect we are not bound to follow them.

22. I have already stated that the weight of the judicial decision of this Court is inclined to the view that in non-appealable cases, a Presidency Magistrate cannot

be compelled to record evidence. In this connection, I would mention -- 'D'Souza v. Emperor (F)', to which I have already referred, in which it was held that Sub-section (4) in terms did not confer any discretion upon a Presidency Magistrate in the matter of recording evidence, although it was true that in one sense the Magistrate had a discretion, because if he did choose to record evidence even in a non-appealable case, it was not illegal for him to do so.

It was pointed out by the learned Chief Justice in this case that under Sub-section (4) of Section 362, the Magistrate's right to refuse to record evidence was absolute and that as long as the case fell within the cases excepted under Sub-section (4), the Magistrate was not bound to record the evidence and the High Court had no jurisdiction to require him to do what the statute said it was not necessary for him to do. If the Magistrate liked to record the evidence, that was another matter; and, as the learned Chief Justice said, probably if he was hearing a case which involved a question of serious consequence to the accused and the accused asked him to make a record of those portions of the evidence on which he wished to rely on an application in revision, the Magistrate would in a proper case comply with that request. But, in the opinion of the learned Chief Justice, the exercise of any such discretion would be 'ex gratia' and not subject to review in the High Court.

I have already stated above that in the full bench decision of this Court in -- 'Shamdasani v. H.P. Mody (G)', the view taken in -- 'D'Souza v. Emperor (P)' and -- 'In re Chhagan Hargovan (E)', was accepted as a correct view and the view taken in -- 'In re Hanifabai (D)', was rejected by implication since it was not followed although it was referred to. Thus, as against the decisions in -- 'Emperor v. Harishchandra (B)' and -- 'In re Hanifabai (D)', we have got the decisions in -- 'In re Chhagan Hargovan (E)'; -- 'D'Souza v. Emperor (F)' and -- 'Shamdasani v. H.P. Mody (G)', the last mentioned one being a full bench case, and therefore there is no doubt that on the whole the weight of the decisions of this Court is against the view taken by Shah J. in -- 'Naran Velji v. Ranjitsingh (A)'.

23. With respect, the view taken in -- 'D'Souza v. Emperor (F)' and -- 'Shamdasani v. H.P. Mody (G)', as to the construction of Sub-section (4) of Section 362, is more

in consonance with the language of Sub-section (4) than the view taken by Shah J. in -- 'Naran Velji v. Ranjitsingh (A)'. It is a more logical view and the one which does no violence to the words of Sub-section (4) which are perfectly plain and clear and present no difficulty of construction. If the Legislature, for clarifying the position which was not so clear as Section 362 stood before its amendment in 1923, deliberately enacted Sub-section (4) laying down in terms that in cases other than those specified in Sub-section (1) of the section, it shall not be necessary for a Presidency Magistrate to record evidence, the High Court cannot compel a Presidency Magistrate to record evidence in any type of non-appealable cases upon the ground that in the exercise of its revisional jurisdiction, it might have the opportunity of scrutinising the evidence and doing justice, so that justice may not only be done, but may also be seen to have been done.

24. As Section 362 stood before the amendment in 1923, the Magistrate was bound to record evidence in cases in which an appeal would lie. A legitimate deduction from this might be that in other cases, i.e., in non-appealable cases the Magistrate had a discretion to record evidence or not to record it. The question whether the said discretion was judicially or reasonably exercised or arbitrarily or capriciously exercised could be adjudicated upon by the High Court. Now, under Sub-section (4) the Legislature has not in terms conferred any discretion upon a Presidency Magistrate in the matter of recording evidence. The Magistrate's right to refuse to record evidence in non-appealable cases is absolute, and if in the exercise of that absolute right of his, the Magistrate refuses to record evidence, it cannot be said that there is failure on his part to exercise his discretion judicially.

At the cost of repetition it may be pointed out, as the learned Chief Justice observed in -- 'D'Souza v. Emperor (F)', that under Sub-section (4) of Section 362, the only discretion which a Presidency Magistrate has is merely a limited discretion in the sense that if he likes to record evidence in a non-appealable case, he may do so, and if he does so, it will not be an illegality. Beyond that, there is no discretion vested in the Magistrate at all under Sub-section (4), and therefore if in the exercise of his absolute right to refuse to record evidence, he does not record evidence, it cannot be said that he is guilty of a failure to exercise his discretion judicially.

25. In the course of his judgment in -- 'Naran Velji v. Ranjitsingh (A)', Shah J. has said that what was implicit in Section 362 as it stood before its amendment in 1923 was made explicit when Sub-section (4) was added to it in 1923. With respect, I would put it differently. I would say that what was not clear and what was left to be inferred under the section as it stood before its amendment in 1923, was made clear when Sub-section (4) was added to it in 1923. Under the section as it stood before 1923, it could be said by an inferential process that a Magistrate had a discretion in him to decide whether he should or should not record evidence in a given non-appealable case. The position was made quite clear when Sub-section (4) was added in 1923 putting it beyond a shadow of doubt that the Magistrate had an absolute right to refuse to record evidence, no matter what type of a non-appealable case it was which he was trying and no matter whether the party insisted upon him that he should record evidence.

Shah J. has observed that under Section 362, Sub-section (4), there is no arbitrary license given to a Magistrate to record or not to record evidence at his pleasure, But, with respect, even if we assume that there is a possibility of the Presidency Magistrates' acting arbitrarily, the said possibility must not have been overlooked by the Legislature when it decided to enact Sub-section (4). Notwithstanding the abovementioned possibility of a Presidency Magistrate acting arbitrarily, the Legislature in unmistakable language said that it shall not be necessary for any Presidency Magistrate to record evidence in non-appealable cases.

26. Of course, I do see the difficulty of a Magistrate being able to remember the gist of evidence in a case in which a large number of witnesses have been examined and several hearings have taken place and where in-between the Magistrate has been busy with other cases as well. But the Legislature must also not have been unmindful of this difficulty and yet they enacted Sub-section (4), apparently trusting that in a given case, that is to say a case in which there was a large number of witnesses to be examined and a case which was likely to take several hearings, the Magistrate would maintain his own private notes for the purpose of refreshing his memory later on at the time of writing his judgment

On the other hand, with great respect to the view taken by Shah J. it is impracticable I think to draw a demarcating line and say that in cases of particular dimensions the Magistrate may not record evidence and in cases exceeding those dimensions he must record evidence. For instance, could it possibly be said that if the witnesses did not exceed a certain number and if the hearing was not likely to exceed a certain number of days, and if the other cases which also the Magistrate had to attend to did not exceed a certain number, he may not record evidence; otherwise he should do so?

I do not think it is practicable to lay down any such hard and fast or rigid rule. The Legislature has certainly the competence to make a law which is contained in Sub-section (4) of Section 362. They have made that law and by doing so they have conferred an absolute right upon a Presidency Magistrate to refuse to record evidence in all non-appealable cases. If in pursuance of that right a Magistrate refuses to record evidence, the High Court cannot compel him to do so, no matter what type of a non-appealable case it may be.

27. Lastly, it may not be out of place to point out that where the Legislature intended that a Magistrate should use his discretion, it said so in terms. For instance, Section 211, Sub-section (2), Criminal P. C., says that the Magistrate may in his discretion allow the accused to put in a further list of witnesses at a subsequent time and Section 212 lays down that the Magistrate may in his discretion summon and examine any witness named by the accused in the list submitted by him under Section 211. We have no doubt that if any discretion was intended to be given to a Presidency Magistrate in the matter of recording evidence in non-appealable cases, at the time of the amendment of Section 362 in 1923, Sub-section (4) would have in terms stated so. The right conferred by Sub-section (4) is unlimited and, therefore, with great respect, I am unable to agree with the view taken by Shah J. in -- 'Naran Velji v. Ranjitsingh (A).

28. As to the result of this revision application, I agree with my learned brother that it must be allowed and the order of conviction and fine passed against the applicant must be set aside.

29. Revision petition allowed.

