

Emperor Vs. Basapa Ningapa

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Court : Mumbai

Decided On : Sep-10-1915

Reported in : (1915)17BOMLR892

Judge : Batchelor and ;Hayward, JJ.

Appeal No. : Criminal Appeal No. 294 of 1915

Appellant : Emperor

Respondent : Basapa Ningapa

Disposition : Appeal dismissed

Judgement :

Batchelor, J.

1. This is an appeal by one Basapa Ningapa who has been convicted by the learned Sessions Judge of Bijapur of the offence of using as genuine a forged document and has been sentenced to three years' rigorous imprisonment.
2. The Assessors agreed that the appellant was guilty of the offence charged.
3. The difficulty which confronts us in taking the view which was adopted by the learned Judge of trial arises from the manner in which the trial was conducted. There are several passages of importance in the judgment which we are unable to

refer to any evidence upon this record. And though the learned pleaders on both sides have done their best to assist us in this respect, none of them is able to justify these particular passages by reference to any recorded evidence. It would seem that the learned Judge allowed himself to refer to matters appearing in other litigation, but not produced and proved upon the present record as they should have been, if they were to be used against the prisoner.

4. Apart from this generally unsatisfactory character of the trial, there has been, so far as we, and the learned pleaders, can discover, a violation of the imperative provisions of Section 342 of the Criminal Procedure Code which enacts that for the purpose of enabling the accused to explain any circumstances appearing in evidence against him, the Court may put such questions as it considers necessary, 'and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence'. On the record before us it appears that the Court omitted to question the prisoner under this section. The case, therefore, in this respect resembles *Subramania v. King-Emperor* (1901) 3 Bom. L.R. 540, where the Judicial Committee observed that 'their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity.' And if it was enough to vitiate the trial there that the accused was tried for more offences than the three offences which are permissible at one trial, then it seems to me a fortiori enough to vitiate this trial that the prisoner was convicted and sent to prison without being asked for his explanation of the matters appearing against him. That omission in my judgment, goes deeper than the illegality which was committed in *Subramania's* case. For, it is, I think, repugnant to one's natural sense of justice that a man should be convicted without being heard. It is no answer to that objection to say that the appellant had an opportunity of making a statement before the Committing Magistrate. For, first, he was entitled, if he chose, to reserve his statement until the Court of Session, and in any event the law provides imperatively that before the Court of Session he shall have an opportunity of making his statement. This view of the consequences of the violation of Section 342 follows that which was taken by a Bench of this Court in *Emperor v. Savalya* (1907) 9 Bom. L.R. 856, where the conviction and sentence were reversed and a retrial was ordered, the Court observing in words which we commend to the

attention of the learned Sessions Judge that 'in all criminal matters, the utmost strictness must be observed and forms must be closely complied with where the liberty of the subject is at stake, when from the statute prescribing those forms it appears that they were prescribed by the Legislature in the interests of the accused.' I may refer also to a similar case of Emperor v. Harischandra (1907) 10 Bom. L.R. 201.

5. On these grounds I am of opinion that this conviction and sentence should be set aside and that the accused should be retried before the Court of Session at Bijapur.

Hayward, J.

6. I concur that there must be a retrial. There are two reasons: (1) the unsatisfactory state of the record, and (2) the omission to examine the accused as required by Section 342 of the Criminal Procedure Code.

7. I have examined the record with care, but have found it difficult to ascertain whether all the documents therein contained were duly proved as required by law. Certain passages in the judgment moreover referred to facts drawn apparently from other documents not appearing upon the record.

8. It is difficult to ascertain from the judgment precisely what were the facts held established against the accused, and the difficulty has been enhanced by the omission to call on him to explain them. It is true, no doubt, that his examination before the Magistrate was formally recorded and that he was defended by a pleader. But the examination before the Magistrate was but perfunctory, and the law requires that an opportunity shall be given to the accused himself to explain and not that this important step in the procedure should be left to his pleader. It appears to me that failure to give the accused the opportunity himself of explaining the points against him as required by Section 342 of the Criminal Procedure Code is more than a mere irregularity covered by the provisions of Section 537 of the same Code. This view is confirmed by the decision of a Bench of this Court in the case of Emperor v. Savalya : (1907)9BOMLR356 , and is, in my opinion, the view which must be taken upon a consideration of the dictum of their Lordships of the

Privy Council, viz., that 'their Lordships are unable to regard the disobedience of an express provision as to a mode of trial as a mere irregularity,' this dictum appearing in the case of Subramania v. King-Emperor (1901) 3 Bom. L.R. 540.

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