

Vithal Tulsiram Vs. the State

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Court : Mumbai

Decided On : Oct-03-1955

Reported in : AIR1956Bom123; 1956CriLJ376

Judge : Dixit and ;Vyas, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 342, 342(1), 362, 362(1), 362(4), 364, 364(2), 364(4), 367 and 370; Bombay Prevention of Gambling Act - Sections 4 and 5

Appeal No. : Criminal Revn. Appln. No. 1101 of 1955

Appellant : Vithal Tulsiram

Respondent : The State

Advocate for Def. : Y.A. Chandrachud, Addl. Asst. Govt. Pleader

Advocate for Pet/Ap. : N.C. Shah, Adv.

Judgement :

Vyas, J.

1. This is an application in revision by Vithal Tulsiram, who was originally accused 1, from an order of conviction under Sections 4 (a) and 5 of the Bombay Prevention of Gambling Act passed by the learned Presidency Magistrate 19th

Court, Esplanade, Bombay.

2. The facts which led up to the prosecution of this applicant along with others are very few. On 22-12-1954, Sub-Inspector Welling called a bogus punter of the name of Hiralal Govind and in the presence of the panchas gave him a marked eight-anna coin. The bogus punter was instructed to go to house No. 14, Roshan Building, 4th Marine Street at Dhobi Talao.

The bogus punter was directed to lay a bet with any person who might happen to be found in house No. 14 and the direction was that the bet was to be laid on figures 1 to 2. Accordingly, the bogus punter went to house No. 14, Roshan Building, and when he went there he found that the present applicant was present in that house. The bogus punter gave his name as Hiralal and asked the applicant-accused 1 to accept a bet of eight annas on figures 1-2.

The punter asked the applicant-accused 1 to accept the marked eight-anna coin which accused 1 did. Thereafter, the bogus punter went out and the police party, who were waiting for him to go out, raided the place. Sub-Inspector Welling and the Panch Yeshwant Devji went into the house. They found that the present applicant and two other persons were near the passage leading into the Roshan Building.

The present applicant was found seated on a stool. He had a pencil in his right hand. His person was searched and as a result of the search of his person, two chits upon which there were figures, amounts and names were recovered. 14 identical blank chits were also found in the left hand of the applicant. In addition to these things, a sum of Rs. 19-6-0, which included the marked eight-anna coin was also recovered from the person of the applicant.

It may be noted that on one of the chits which were recovered from the person of the applicant-accused 1, there was an entry mentioning the name of the bogus punter Hiralal. It also mentioned the amount of eight annas and it also mentioned the figures 1-2. Upon this material, the applicant and his two companions were prosecuted upon a charge under Sections 4 (a) and 5, Bombay Prevention of Gambling Act.

The two associates of the applicant, viz., accused 2 and 3, were acquitted at the end of the trial, but the present applicant was convicted under Sections 4 (a) and 5, Prevention of Gambling Act and having regard to the fact that he had three previous convictions against him, he was sentenced to suffer six months' rigorous imprisonment. This is an application in revision against that order of conviction and sentence.

3. Now, so far as the merits of the case are concerned we have no hesitation in coming to the conclusion that the conviction of the applicant is perfectly correct. There is the evidence of Sub-Inspector Welling supported by the evidence of the panch Yeshwant Devji to show that the applicant was present in the passage leading into the Roshan Building and that when his person was searched, two chits and a certain amount were recovered from him.

The amount recovered was Rs. 19-6-0 and it included the marked eight-anna coin which the punter had given to the applicant at the time of laying a bet upon the figures 1-2, On one of the two chits, which were recovered from the person of the applicant, there was an entry and that was an entry in respect of the particular bet which was laid by Hiralal upon the figures 1-2 and for which Hiralal had given the marked eight-anna coin to the applicant.

The entry in question mentions the name of Hiralal. It mentions the figures 1-2 & it also mentions the amount of eight-annas. This fact lends a strong corroboration to the evidence of the Police Sub-Inspector who has deposed that the chits in question were satta chits because they bore the figures, the amounts and the names of persons who had laid bets.

It is scarcely necessary to add any more comments to what I have stated in order to show that the charges under Sections 4 (a) and 5, Prevention of Gambling Act are brought home to the applicant.

4. Then the learned Advocate Mr. Shah appearing for the applicant pressed certain law points before us and the first point which was urged before us was that there was a serious defect in the procedure adopted by the Magistrate in so far as he failed to record the evidence of witnesses in this case. Now, in this connection,

the relevant provisions of law are to be found in Section 362, Sub-section (4), Criminal P. C. Section 362, Sub-section (4) lays down

'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'.

Sub-section (1) of Section 362 refers to cases tried by a Presidency Magistrate in which an appeal lies and Sub-section (4) of Section 362 refers to cases other than those cases. In other words, it refers to non-appealable cases. The effect of the provisions of Sub-section (4) of Section 362 therefore, is that in non-appealable cases tried by a Presidency Magistrate, it will not be necessary for the Magistrate to record the evidence or frame a charge.

This Sub-section (4) of Section 362 came up for construction before a Division Bench of this Court consisting of my learned brother and myself and that was a case in -- 'State v. Iris Chandrabala Premnath', (S) : AIR1955 Bom45 (A). It was held in that case that under Section 362 (4), Criminal P. C., 1898, a Presidency Magistrate was not required to record evidence in cases not covered by Section 362 (1) of the Code, Therefore, under Section 362 (4) of the Code, a Presidency Magistrate had a right to refuse to record evidence, and once the Magistrate decided not to record the evidence, his decision was not subject to a review by the High Court.

We also pointed out that in a limited sense there is a discretion in a Presidency Magistrate under Section 362 (4) of the Code, namely, that he might record evidence if he chose to do so even in a non-appealable case. Except in that limited sense, Section 362 (4) did not envisage any discretion in a Presidency Magistrate.

5. Mr. Shah for the applicant has invited our attention to a decision of Shah J., in -- 'Naran Velji v. Ranjitsingh Jamnadas Kapadia', (S) : AIR1955 Bom42 (B). This judgment came up for consideration before us in -- 'State v. Iris Chandrabala Premnath', (A), and we were, with respect, unable to accept the principle laid down by Shah J.

The view of Shah J., was that in cases where either substantial questions of law or of appreciation of evidence arose or adjournments were necessitated and evidence of witnesses was 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. We pointed out that, if a Magistrate could reasonably anticipate that a long time would elapse between the hearing of evidence and the writing of a Judgment, he would keep rough notes of evidence for refreshing his memory.

In this particular case, however, even the difficulty which weighed with Shah J., did not arise, because the learned Magistrate wrote the judgment on the same date upon which he had heard the evidence and also questioned the accused. That being so, we do not see any force in the contention of Mr. Shah that the procedure adopted by the learned Magistrate in this case was vitiated because he did not maintain a record of the evidence of witnesses.

6. The next point which was urged before us by Mr. Shah was that the procedure adopted by the learned Magistrate was vitiated by reason of the fact that he did not keep a record of the statement of the accused. In this connection Mr. Shah invited our attention to the provisions of Section 342, Criminal P. C., and Section 342 lays down that the Court, after the witnesses for the prosecution have been examined and before the accused is called on for his defence, shall generally question the accused on the case in order that the accused might have an opportunity to explain the circumstances arising in the evidence against him. Then Mr. Shah has drawn our attention to the provisions of Section 364 and Section 364 says

'(1) Whenever the accused is examined by any Magistrate, or by any Court other than a High Court the whole of such examination including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands and he shall be at liberty to explain or add to

his answers.' Then there is Sub-section (2) of Section 364 which lays down,

'When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused etc., etc.' From these provisions of Section 364, Mr. Shah has contended before us that it was obligatory upon the Magistrate to question the accused generally after the witnesses for the prosecution had been examined and before he was called on for his defence, to record the answers of the accused in full and to take the signature of the accused at the foot of his statement.

Now, it is to be seen in this case that the accused was questioned by the learned Magistrate under Section 342, Sub-section (1), after the prosecution witnesses had been examined and this is clear enough from para. 4 of the judgment of the learned Magistrate in which he says 'Accused 1 says that the chits were not with him. He did not accept the bogus punter's bet'.

When the learned Magistrate made these observations in para. 4 of his Judgment, he was clearly referring to the answers which must have been given by the accused to the questions which the Magistrate must have put to him after the prosecution witnesses had been examined. It is to be noted in this connection that Section 342 (1), Criminal P. C., imposes an obligation upon a Magistrate that he shall, after the witnesses for the prosecution have been examined and before the accused is called on for his defence, generally question the accused on the case and Section 364, Criminal P. C., lays down the procedure as to how the Magistrate shall discharge that obligation.

For instance, Sub-section (1) of Section 364 says that whatever answers the accused may give to the questions put to him under Section 342 (1) by the Magistrate, shall be recorded in full by the Magistrate and that shall be done in the language in which the accused is examined etc., etc. Then Sub-section (2) says that, after a record of the answers of the accused as provided by Sub-section (1) of Section 364 is made, the accused shall be called upon to sign that statement.

It is to be noted that these procedural requirements do not apply to the examination of an accused person in the case of a trial held by a Presidency

Magistrate. This is laid down by Sub-section (4) of Section 364. Reading Section 342 (1) and Section 364 (4) of the Code together, the position is that although the Magistrate is bound to question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for defence, it is not obligatory upon the Magistrate to maintain a record of the answers given by the accused or to obtain a signature of the accused at the foot of these answers if he is a Presidency Magistrate.

It is because this procedural requirements of Section 364 are not to be observed in the case of a trial held before a Presidency Magistrate that we find that the Legislature enacted Clause (f) of Section 370. Section 370 says:'

'Instead of recording a Judgment in manner hereinbefore provided, a Presidency Magistrate shall record the following particulars:(f) the plea of the accused and his examination (if any).'

We have no doubt that, if the intention of the Legislature was that even in respect of trials held before a Presidency Magistrate, a Presidency Magistrate was bound to maintain a record in full of the statement made by an accused person in response to questions put to him under Section 342 (1), Clause (f) of Section 370 would not have been enacted. Section 370 provides that in respect of cases tried by a Presidency Magistrate, the Judgment, instead of conforming to the requirements of Section 367, shall be in a form laid down in Section 370.

It is, therefore, clear that in respect of cases tried by the Presidency Magistrates the substance of the examination of the accused which it is obligatory upon the Magistrate to make under Section 342 (1) of the Code, is to be embodied in the judgment of the Magistrate itself and the judgment is to be in the form prescribed by Section 370. As I have pointed out above, the substance of the statement which the applicant must have made before the Court in response to the questions put to him by the Magistrate under Section 342 is contained in para. 4 of the learned Magistrate's Judgment. That being so, we are unable to see any force in the second submission made before us by the learned Advocate Mr. Shah for the applicant.

7. Mr. Shah says that the sentence of sixmonths' rigorous imprisonment Imposed upon theapplicant is too severe and that it should be reduced. It may be noted that this accused has gotthree previous convictions to his credit. Havingregard to that circumstance, we are of the viewthat, if anything, the sentence errs on the sideof leniency. In the result, the application failsand the rule will be discharged.

8. Rule discharged.

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