

Krishna Nayar Ram Nayar Vs. State

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Court : Mumbai

Decided On : Sep-12-1958

Reported in : (1959)61BOMLR684; 1960CriLJ324

Judge : Datar and ;Tarkunde, JJ.

Acts : [Bombay Prohibition Act, 1949](#) - Sections 116; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 5(2), 264 and 362

Appeal No. : Criminal Appeal No. 887 of 1958

Appellant : Krishna Nayar Ram Nayar

Respondent : State

Advocate for Def. : V.H. Gumaste, Asst. Govt. Pleader

Advocate for Pet/Ap. : K.B. Joshi, Adv.

Judgement :

Tarkunde, J.

(1) The appellant was convicted by the Presidency Magistrate, 27th Court, Mulund, Bombay, under secs. 65(b), 65(F) and 66(b) of the Bombay Prohibition Act and sentenced to rigorous imprisonment for six months and a fine of Rs. 500/- in default rigorous imprisonment for three months. He has come in appeal from

the order of conviction and sentence.

(2) The prosecution case was that on 2-11-1957, a Police party had gone for patrolling in the Chandivali Jungle that they came across a working still for the manufacture of illicit liquor at about 7 p.m. on that day, and that the appellant was found operating that still and was arrested on the spot. The Police party seized a quantity of illicit liquor, some wash, and certain utensils for the manufacture of liquor. The appellant pleaded that he was not guilty of the offences charged against him, that he was not arrested in Chandivali Jungle, and that he was picked up from his house at Kurla Road at about 5.30 p.m. on that day.

(3) The prosecution evidence consisted of the depositions of two Police Constables who were in the Police party that was patrolling the Chandivali Jungle on the day of the offence. As the still was found in a jungle, no panchnama was made about it. The accused examined two witnesses to prove that he was arrested at about 5.30 p.m. on that day from his house at Kurla Road. The learned magistrate relied upon the evidence of the Police Constables, rejected the evidence of the defence witnesses, and came to the conclusion that the alleged offences were established beyond a reasonable doubt.

(4) We find that, although this was a case under the Prohibition Act, the learned Presidency Magistrate has not recorded the substance of the evidence of the witnesses examined on behalf of the prosecution and on behalf of the accused. The learned magistrate has stated in his judgment that the two Police Constables were cross-examined in the minutest details and for some length of time, but we do not find the substance of that cross-examination from the record of the case. The evidence of the first Police Constable examined on behalf of the prosecution, Sampat Atmaram, consists, according to the record, of only a few lines. Regarding the other prosecution witness Balkrishna Yeshwant, the learned Presidency Magistrate has noted that in his examination-in-chief the witness corroborated the earlier prosecution witness Sampat Atmaram, but the substance of the examination-in-chief is not mentioned in the notes maintained by the learned Presidency Magistrate. The record of his cross-examination consists of two short lines with many crosses. It is clear that this record consists of some stray notes

which the learned Presidency Magistrate made of the evidence led before him and does not purport to be the substance of the evidence of the witnesses. It appears further that towards the end of the case the learned Magistrate towards the end of the case the learned Magistrate was requested on behalf of the accused that an appealable sentence should be passed against him. The learned Magistrate says in that connection that he had initially intended to pass a non-appealable sentence and proceeds to say : 'I may add that it is due to last minute request coming from the defence that detailed notes of evidence are not on record, though the sentence I am going to impose is an appealable one.'

(5) We are of the opinion that irrespective of whether the learned Magistrate intended initially to impose an appealable sentence or not, it was incumbent upon him to record the substance of the evidence of each witness when the evidence was led in Court. The procedure to be ordinarily followed by Presidency Magistrates in regard to the recording of evidence is mentioned in S. 362 of the Cri. P. C. According to that section, no evidence need be recorded where the Presidency Magistrate does not propose to impose an appealable sentence on the accused. It appears that the learned Presidency Magistrate does not propose to impose an appealable sentence on the accused. It appears that the learned Presidency Magistrate was acting on the assumption that the procedure laid down in Section 362, Cri. P. C. is to be followed even in cases under the Bombay Prohibition Act. Section 116 of the Bombay Prohibition Act, however, requires a somewhat different procedure to be adopted. That section says : 'In all trials for offences under this Act, the Magistrate shall follow the procedure prescribed in the Code of Criminal Procedure, 1898, for the trial of summary cases in which an appeal lies.' The procedure for the trial of summary cases is to be found in Chapter XXII of the Criminal P. C. consisting of Ss. 260 to 265. Out of these sections, Section 263 applies to cases where no appeal lies, and Section 264 to cases in which an appeal lies. Under Section 263, the Magistrate is not required to record the evidence of witnesses or to frame a formal charge, but has to enter certain particulars in a prescribed form. Section 264, as amended by Parliamentary Act XXVI of 1955, provides :

'In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall record the substance of the evidence and also the particulars mentioned in Section 263 and shall, before passing any sentence, record a judgment in the case.'

Now, none of the sections in Chapter XXII of the Cri. P. C. including Section 264, apply normally to trials conducted by Presidency Magistrates. Section 116 of the Bombay Prohibition Act, however, makes it clear that the procedure mentioned in Chapter XXII of the Cri. P. C. in so far as it relates to cases in which an appeal lies, has to be followed even by Presidency Magistrates in the trial of cases under the Prohibition Act. This is clear from the fact that section 116 provides the procedure for 'all trials for offences under this Act.' The learned Presidency Magistrate not having recorded 'the substance of the evidence' in this case the trial of the appellant was clearly irregular.

(6) The learned Assistant, Government Pleader argues that inasmuch as the judgment of the learned Presidency Magistrate embodies the substance of the evidence in the case, we should hold that Section 264 has been substantially complied with. We are unable to accept this argument. When Section 264 provides that the Magistrate shall record the substance of the evidence, it is implied that the substance of the evidence is to be recorded at the time when the evidence is given in Court. To embody the substance of the evidence in a judgment from memory or from short notes made at the time when evidence was given does not amount to compliance with Section 264. This is further clear when we consider the wording of the original Section 264 which was replaced by the amendment brought about by Parliamentary Act XXVI of 1955. That section as it originally stood required that the Magistrate 'shall, before passing sentence, record judgment embodying the substance of the evidence and also the particulars mentioned in Section 263.' The purpose of amending this section was obviously to require that the record of the substance of the evidence shall be separate from the judgment delivered by the Magistrate.

(7) The learned Assistant Government Pleader has also argued that in this case learned Presidency Magistrate has in fact recorded the substance of the evidence

of witness at the time when the evidence was given in his Court. We find that what the learned Presidency Magistrate has done is to record a few notes and no attempt was made by him to record the substance of the evidence. The expression 'the substance of the evidence' occurs in several sections of the Code of Criminal Procedure, and what is implied by that expression is that all the important or substantial part of the deposition of each witness should be recorded by the presiding authority. That obviously has not been done in this case.

(8) It was further argued by the learned Assistant Government Pleader that at the time when the Prohibition Act, including Section 116 therein, was passed by the Bombay Provincial Legislature in 1949. Section 264, of the Cri. P. C. as it then stood required the Magistrate merely to embody the substance of the evidence in his judgment, and that the Bombay Provincial Legislature must have intended that the procedure which is to be followed in cases under the Bombay Prohibition Act is the procedure laid down in Section 264 of the Cri. P. C. as it then was and not the procedure of the section as substituted by the amending Parliamentary Act XXVI of 1955. This argument is clearly untenable, because the intention of the Legislature is to be gathered from the language used in the legislation and not from any extaneous source. The language used in Section 116 of the Bombay Prohibition Act shows that the legislature intended that the same procedure shall be followed for the trial of offences under that Act as is followed in the 'trial of summary cases in which an appeal lies'. It is clear, that the Magistrate who tries a case under the Prohibition Act has merely to apply the same procedure which is applicable at the time of the trial to 'summary cases in which an appeal lies'. If we were to accept the argument of the learned Assistant Government Pleader, we would have to come to the conclusion, which appears to us absurd that the provisions which now apply to the trial of warrant cases after the amendments brought about by Parliamentary Act XXVI of 1955 would also be inapplicable to all cases under the Prohibition Act.

(9) It was further urged by the learned Assistant Government Pleader that the alleged irregularity in procedure of the learned Presidency Magistrate has not caused any prejudice to the appellant and that therefore we should not interfere with the order of conviction. It is obvious to us that the case of the appellant has

been prejudiced by the irregular procedure, the reason being that in the absence of an adequate record of the substance of the evidence in the case, it is not possible for us in appeal to decide whether the conviction of the appellant was justified.

(10) We must, therefore, set aside the order of conviction and sentence. We have considered whether we should order a retrial of the appellant, but have come to the conclusion that, in the circumstances of the case, a retrial would expose the appellant to unmerited harassment. The alleged offence took place nearly a year back. After his conviction the appellant was in jail for about three weeks before he was released on bail. The prosecution evidence consists of two Police Constables only. Under the circumstances, we hold that the appellant should not be retried, but should be acquitted of the offences of which he was charged.

(11) In the result, we allow the appeal, set aside the order of conviction and sentence, and acquit the accused. The bail bond is cancelled. Fine, if paid, should be refunded.

(12) Appeal allowed.