

Emperor Vs. Harischandra Talcherkar

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Court : Mumbai

Decided On : Dec-11-1907

Reported in : (1908)10BOMLR201

Judge : Chandavarkar and ;Knight, JJ.

Appeal No. : Criminal Application for Revision No. 261 of 1907

Appellant : Emperor

Respondent : Harischandra Talcherkar

Disposition : Appeal allowed

Judgement :

Curiam, J.

1. We are of opinion that the learned Presidency Magistrate who tried this case has not observed the procedure prescribed by law. In his report he says that he tried it as a warrant case, subject, however, to the provisions of Section 362 of the Code of Criminal Procedure. But if he did try it as a warrant case then it is impossible to understand why he has not only recorded no evidence but has framed no charge and recorded no examination of the accused as required by law. As Mr. Branson has pointed out, there is no pretence for suggesting because there is nothing whatever to show that there was any charge read out to the accused or

that the accused was given to understand what it was that he had to meet. Judging from the record such as it is (and all that we have to go upon is the Magistrate's judgment), he appears to have dealt with the case summarily. Assuming that the Magistrate had jurisdiction to so deal with it he was bound to record a summary of the accused's examination. The learned Magistrate observes in his report that he tried the case subject to the provisions of Section 362 of the Code of Criminal Procedure. No doubt the section lays down that except in certain cases the Magistrate shall take down evidence in the manner prescribed thereby, but that does not mean that in the cases excepted he can act arbitrarily and record nothing by way of evidence. The exception gives him merely a discretion to take down the evidence or not; in other cases to which the exception does not apply he is bound to record the evidence. But the discretion, like all discretionary powers, should be exercised judicially in a reasonable spirit and not arbitrarily. For instance, in cases of petty offences such as 'nuisances,' or what are called in Police parlance 'morning cases,' there may be no necessity to record any evidence. But in a case of this kind, where an educated man holding a comparatively respectable status in life is charged with an offence reflecting on his character and serious allegations are levelled against him, there ought to have been some record of evidence to enable him in a case of conviction to come up to this Court in revision and satisfy it that the conviction is wrong.

2. Further, Section 342 made it incumbent upon the Magistrate to examine the accused and to give him an opportunity of explaining away whatever might have been elicited against him in the evidence for the prosecution. But we see no trace of any such examination, and even if we presume that the magistrate did examine the accused, still we do not know what explanation the latter gave. We must deal with the case as one where the accused has been seriously prejudiced by the procedure of the Magistrate.

3. We hope this procedure will not be followed up in such cases. For these reasons we reverse the conviction and sentence and direct the fine, if paid, to be refunded. And as the learned Counsel Mr. Branson has suggested that there ought to be a re-trial, we direct the Court below to try it according to law. The second Presidency Magistrate, Mr. Dustoor, having formed already a decided

opinion on the case, we think that we must yield to the request of Mr. Branson and that the case must be tried by another Presidency Magistrate. It will be for the Chief Presidency Magistrate to decide who that Magistrate ought to be. That case should be tried by such other Magistrate than Mr. Dastur as the Chief Presidency Magistrate shall direct.

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