

Phulloo and ors. Vs. State

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Court : Allahabad

Decided On : Nov-09-1964

Reported in : AIR1966All181; 1966CriLJ385

Judge : H.C.P. Tripathi, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 251A(7), 342 and 540

Appeal No. : Criminal Reference No. 432 of 1963

Appellant : Phulloo and ors.

Respondent : State

Advocate for Pet/Ap. : S.S. Tyagi, Adv.

Judgement :

ORDER

H.C.P. Tripathi, J.

1. A case under Section 457 I. P. C. was pending against the applicants in the Court of Sri Bhikha Lal Judicial Magistrate Deoband at Saharanpur. The case was started by the police on a report which was lodged with it by one Sarjeet on the allegation that in the night of 31st July and 1st of August 1962 a theft was committed in his house by breaking open the roof of a room. On 28-12-1962 charges were framed against the applicants under Section 457 I. P. C. and 11-1-

1963 was fixed for prosecution evidence. On that date the witnesses did not turn up and the case was adjourned to 21-1-1963 on which date the witnesses for the prosecution were present in Court but the Assistant Public Prosecutor was not available to examine them. On that date the learned Magistrate passed an order in which he inter alia stated as follows:

"Even today the A. P. P. is not vigilant and no witness out of the present ones is being examined before the Court. The prosecution is slack to this extent that it did not avail of three opportunities given for prosecution evidence..... It clearly reflects that the A. P. P. is remiss in his duty and the accused are being persecuted and harassed for no fault of theirs Under these circumstances I close the prosecution case. Let statements under Section 342, Cr. P. C. be recorded today'.

2. Subsequently it appears that the Assistant Public Prosecutor filed an application for the examination of the prosecution witnesses under Section 540 Cr. P. C. On this application the following order was passed by the learned Magistrate on 5-2-1963:

'Though the prosecution has misused the opportunities yet justice and equity require that the prosecution be not condemned unheard and its evidence be taken under Section 540 Cr. P. C.'

3. Complainant Sarjeet and the accused, both, came up in revision before the learned Additional District Magistrate, the former challenging the order of the Magistrate closing the prosecution evidence and the latter impugning his order of 5-2-63 directing the prosecution witnesses to be examined under Section 540 Cr. P. C. The learned Additional District Magistrate has recommended that both the revisions should be allowed and the two orders passed by the learned Magistrate should be quashed.

4. I have heard Sri S.S. Tyagi learned counsel for Phulloo and others.

5. There can be no doubt that the impugned orders of the learned Magistrate are wholly illegal and must be quashed. It is no doubt true that the Assistant Public Prosecutor who was to conduct the prosecution on behalf of the State before the

Magistrate appears to have been negligent of his duties. But it is also true that under the law a duty is cast on Court as well in a cognizable case to ensure the attendance of the prosecution witnesses in Court and to examine them if they are available. In the instant case, from the order of the Magistrate dated 2nd of February 1963 it is clear that the prosecution witnesses were present in Court but the Assistant Public Prosecutor wasnot available to examine them and hence the Magistrate passed the order closing the prosecution case and proceeded to record the statement of the accused under Section 342 Cr. P. C. The proper course for the Magistrate, in the circumstances, was to examine the witnesses who were present in Court instead of awaiting for the arrival of the public prosecutor. As the witnesses were available for examination there was no justification for the Magistrate to have passed the order closing the prosecution case and therefore, that order must be set aside.

6. The order passed by the Magistrate on 5-2-1963 directing the prosecution witnesses to be examined under Section 540, Cr. P. C. is also wholly unjustifiable. That order is a result of the mistake which he committed in closing the prosecution case by his order of 2-2-1963. If the entire prosecution evidence is recorded under Section 540, Cr. P. C. it is bound, to prejudicially affect the interest of the accused.

7. In the result, the references are accepted and orders, dated 2-2-1963 and 5-2-1963 passed by the learned Magistrate in Criminal Case No. 500 of 1962, State v. Phulloo and others are quashed and the case is remanded back to him with a direction that he will allow the prosecution to lead evidence and then shall decide the case in accordance with law.

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