

**Bhajja Vs. Emperor**

**Bhajja Vs. Emperor**

**SooperKanoon Citation :** [sooperkanoon.com/456748](http://sooperkanoon.com/456748)

**Court :** Allahabad

**Decided On :** Dec-02-1938

**Reported in :** AIR1939All238

**Appellant :** Bhajja

**Respondent :** Emperor

**Judgement :**

ORDER

**Allsop, J.**

1. This is an application in revision by the Local Government against an appellate order passed by the learned Sessions Judge of Cawnpore on 9th July 1938. One Bhajja was convicted of the offence of theft and sentenced to rigorous imprisonment for the period of six months. He appealed to the learned Sessions Judge who did not hear the appeal upon its merits but set aside the conviction and sentence and ordered a retrial upon the technical ground that the Magistrate had made a mistake in procedure during the course of the trial. The witnesses for the prosecution were examined upon 6th June. On the same day the statement of the accused was taken and a charge was framed, read out and explained to the accused who pleaded not guilty. The Magistrate then adjourned the case to 7th June and on that date he asked the accused whether he wished further to cross-examine the witnesses for the prosecution. The accused said that he did not wish

to examine them further. The learned Judge thinks that the Magistrate did not comply properly with the provisions of Section 256, Criminal P.C. That Section says that the accused if he refuses to plead to the charge or does not plead or claims to be tried shall be required to state at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken.

2. The learned Sessions Judge says that he cannot agree that the provisions of the law were satisfied by taking up the case on the day following the day on which the charge was framed for the express and sole purpose of asking the accused whether he wished to cross-examine. I can see no force in the learned Judge's contention and this contention does not appear to be supported by any authority. The word 'hearing' is not defined anywhere in the Criminal Procedure Code. It seems to me that the intention of the law was that the Magistrate should adjourn the case, after framing the charge and recording the plea of the accused, to a later date so that the accused might have time to consider whether he wished further to examine the witnesses for the prosecution. I cannot see why it should be considered that the proceedings on the adjourned date are not a 'hearing' merely because no other action is to be taken on that date. The learned Judge thinks that the question must be put to the person accused on a date which is fixed for some other purpose. That other purpose might be the examination of further witnesses for the prosecution or the examination of witnesses for the defence or the hearing of arguments and the delivery of judgment. In the first case, no great harm would perhaps be done if the question about cross-examination was put to the accused on the date when the other witnesses for the prosecution were to be examined. In the second case I think it would be unfair to the witnesses for the defence to require their attendance when it might well be that there would be no possibility of examining them. If the person accused expressed his intention of cross-examining; the witnesses for the prosecution the evidence of the defence could not be taken-until that cross-examination was completed. It also seems to me that it would be somewhat anomalous to fix a date for the production of witnesses for the defence before ascertaining whether the person accused wished further to cross-examine the witnesses for the prosecution. According to the provisions of

Sec 256, Criminal P.C., the accused shall be called upon to enter upon his defence and produce his evidence only after the witnesses for the prosecution have been examined, cross-examined, re-examined and discharged. That being so, it seems that it would be improper for a Magistrate to require the person accused to summon his witnesses in defence until it had been ascertained whether further cross-examination of the witnesses for the prosecution was necessary.

3. On general principles apart from the wording of the Section it seems to me that a person accused might well have a grievance if he were required to summon witnesses for the defence before he had decided whether he would further cross-examine the witnesses for the prosecution. If he did so desire and if the cross-examination disclosed that there was no case against the person; accused, it would not be necessary for him to incur the expense and trouble of summoning witnesses in defence. Far from agreeing with the learned Sessions Judge I am rather inclined to think that the procedure followed by the Magistrate was the only procedure strictly in consonance with, the provisions of Section 256, Criminal P.C.

4. I should like further to mention the provisions of Ch. 45, Criminal P.C., which deals with irregular proceedings. Section 529, the first Section in that Chapter, mentions certain acts performed by a Magistrate which if performed erroneously but in good faith shall not lead to the setting aside of the proceedings. Section 530 mentions certain irregularities which vitiate proceedings. Section 531 says that no finding, sentence or order of a Criminal Court shall be set aside merely upon the ground that the enquiry, trial or other proceeding in the course of which it was arrived at or passed took place in a wrong place. Section 532 deals with the circumstances in which commitments may be quashed. Section 533 says that non-compliance with the provisions of Section 164 or Section 364 shall set render statements recorded under these Sections inadmissible in evidence unless the error committed has injured the accused is to his defence on the merits. Section 534 says that an omission to inform under Section 447, Criminal P.C., any person of his rights under Ch. 23 shall not affect the validity of any proceeding. Section 535 says that a failure to frame a charge shall not render finding or sentence invalid unless a failure of justice has in fact been occasioned thereby. Section 536

says that a trial shall not be invalid only upon the ground that an offence triable by assessors has been tried by a jury or that an offence triable by a jury has been tried with the aid of assessors. Section 537 says:

Subject to the provisions hereinbefore contained on finding, sentence or order passed by Court of competent jurisdiction shall be reversed or altered under Ch. 27 or on appeal or revision on account,

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any enquiry or other proceeding is under thin Code, or

(b)(omitted),.

(c) of the omission to revise any list of jurors or assessors in accordance with Section 324 or,

(d) of any misdirection in any charge to a jury, unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice,

Explanation, - In determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, he, Court shall have regard to the fact whether the objection could and should have been raised at MI earlier stage in the proceedings.

5. The provisions of Section 537 are mandatory and I cannot see that any Court is entitled, to set aside a finding, sentence or order of a (Subordinate Court in direct contradiction of the tomsi of the Section. The words "subject to the provisions hereinbefore con. Sained' must refer to the other Sections in that Chaptor unless there is any specific provision in any other Section of the Code which says that any particular error will vitiate proceedings in. spite of the fact that on failure of justice has been occasioned by such error. I am aware of the fact that there is considerable authority for making a distinction between irregularities which may be cured under the provisions of Section 537 and illegalities which may not be so cured, but speaking for myself I doubt whether such a distinction is justified by any Section in the of Code of Criminal Procedure. It must be remembered that the

procedure in this country is governed by statute and it seems to me doubtful whether it is admissible for a Court to go outside the statute and proceed in a manner contrary to its provisions merely on general principles.

6. It may be said that the distinction between illegalities and irregularities has the authority of their Lordships of the Privy Council expressed in *Subramaniya Aiyar v. Emperor* (1902) 25 Mad. 61, but I do not think their Lordships meant that Courts in this country were to ignore the provisions of the statute which governs the procedure of all Courts including Courts of Appeal. I think what they meant was that there were irregularities so gross (they described such irregularities as illegalities) that it might be presumed from the existence of the irregularity itself that there must have been a failure of justice which would justify a Court in setting aside a sentence, finding or order : *Abdur Rahman v. Emperor* . In the present case if the proceedings of the Magistrate were irregular I do not think it can be said that the irregularity was 'so gross that it must necessarily be inferred that the person accused was prejudiced upon the merits of his defence. I am unable to support the order of the learned Judge, I therefore set it aside and direct that the appeal shall be heard upon its merits.

7. It has been brought to my notice that the order of 9th July 1938 was not communicated to the Superintendent of the Jail and the result was that Bhajja was kept in prison as a convicted person until 19th November 1938 when notice of the Government revision was sent to the District Jail. As I have now set aside the order of the learned Sessions Judge in appeal, the position is that the order of the Magistrate is in force until the appeal is decided. The appellant will thus be considered to be serving his sentence and when, the period of the sentence expires he will be released whether the appeal has been decided or not decided on that date.