

**Sarju and ors. Vs. Emperor**

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**SooperKanoon Citation :** [sooperkanoon.com/462713](http://sooperkanoon.com/462713)

**Court :** Allahabad

**Decided On :** Sep-30-1931

**Reported in :** AIR1932All28

**Appellant :** Sarju and ors.

**Respondent :** Emperor

**Judgement :**

ORDER

Niamatullah, J

1. The applicants Sarju, Manki and Baram with two others, Dhari and Chandrajit, were convicted by a Magistrate, First Class, Ghazipur, of an offence under Section 579, I.P.C., in that they stole the gram crop belonging to one Ramdeo in village Sarauli. Chandrajit, aged 16, was released on his executing a bond under Section 562, Criminal P.C. On appeal by the remaining four accused the learned Sessions Judge acquitted Dhari.

2. The complainant found on several occasions that his gram crop in a certain field was partly removed over night. On the night between 3rd and 4th March 1931 he in company of one Hardeo, kept a secret watch on the field. After midnight according to the case for the prosecution the five accused entered his field and began to cut the crop standing thereon. The complainant and Hardeo quietly advanced towards the field, and when they were sufficiently near the spot, the

complainant made a rush towards the thieves. Basram was caught on the spot but the others made good their escape. A report was made at the thana next morning. The investigation resulted in the prosecution of all the five accused.

3. The evidence in the case was direct. There was no question of identification, the accused being all known to the complainant and Hardeo. The accused examined the village patwari in defence to establish the fact that there had been no gram crop in the field in question in that year. The field in which theft is alleged to have been committed is No. 415/1. The patwari showed from the records in his possession that wheat had been sown and not gram. This surprise was sprung on the prosecution at a late stage of the case. No suggestion of this kind was made so far as the record shows when the complainant was examined, nor did the accused state in their defence that the field had not been sown with gram at all. The learned Magistrate made an inspection of the field and discovered stumps of dried gram plants. A grievance is made of the fact that the learned Magistrate did not give any previous intimation of his intention to visit the field and that he did not record the result of his inspection in a note which as required by Section 539-B, Criminal P.C. should have been made part of the record.

4. The learned advocate for the applicants has argued before me that the omission on the part of the learned Magistrate to make a record of what he saw on the spot and to file it as required by Section 589-B, Criminal P.C. is not a mere irregularity but an illegality which vitiates the trial, apart from any prejudice to the accused resulting from the non-observance of the aforesaid provision. He argues in the alternative that even if it was no more than an irregularity, in its very nature it is calculated to prejudice the accused in so far that he was deprived of an opportunity of satisfying the Magistrate that what he found on the spot were not the stumps of gram crop since gathered but of wheat crop. He has referred to a number of authorities in support of his contention. It is true that a Bench of the Calcutta High Court, held in *Hriday Govinda Sur. v. Emperor* : AIR1924 Cal1035 , that non-observance of the provisions of Section 539-B amounts to an illegality which vitiates the trial. This case was however not followed in the subsequent case of *Forbes v. Ali Haider Khan* : AIR1926 Bom534 , in which it was observed by one of the learned Judges who formed the Bench that:

there is no universal rule that disobedience of a mandatory provision of a statute results in nullification of all proceedings irrespective of any question of prejudice.

5. In *Khushal Jeram v. Emperor* : AIR1926 Bom534 it was held that an omission to record any relevant facts that may be observed by a Magistrate at an inspection made under Section 539-B, Criminal P.C. 1898, is not an illegality vitiating the whole trial, but is an irregularity which can be remedied under Section 537 of the Code. The case of *Hriday Govind Sur v. Emperor* : AIR1926 Bom534 was expressly dissented from, and the later case above referred to was followed.

6. In many cases it may be difficult to distinguish between an illegality and irregularity, but it may be safely said that a mere error of procedure arising out of inadvertence will amount to no more than an irregularity. In the case before me I have no doubt that if the attention of the learned Magistrate had been drawn to the necessity of making a memorandum of his observations on the spot and making it a part of 'the record he would have done so. The safest guide is the language of Section 537, Criminal P.C. which provides that no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed on account of any error, omission or irregularity in any proceeding unless such error, omission or irregularity has in fact occasioned a failure of justice. In the case before me there was an 'omission' on the part of the Magistrate trying the case to make a note of his observation and to place it on the record. If such 'omission' has in fact occasioned a failure of justice the trial is vitiated, otherwise the 'omission' is condoned. I am unable to say, having regard to the circumstances of this case that a failure of justice was occasioned in consequence of the omission of the kind referred to. I asked the learned advocate for the applicants to mention definitely how his clients were prejudiced and to illustrate the action they would have taken in their defence if such an omission had not occurred. He gave the only possible reply, viz., that the accused would have made an attempt to establish that what the Magistrate found in the field were not the stumps of gram plants. It appears from the evidence of the patwari that according to him wheat had been sown in field No. 415/1. It is impossible to make a mistake as regards the stumps where the question is whether they are of wheat plants or gram plants. The learned Magistrate has largely relied in support of his finding on certain circumstances

mentioned in his judgment and has used his own observation merely to disprove the patwari's evidence. He has pointed out that the accused never hinted before the patwari was examined that the field had not been sown with gram crop at all, He also emphasized the fact that if wheat had been sown in the field the complainant could not possibly have alleged that the accused stole gram crop. His purpose could have been equally served, if desired to falsely implicate the accused, to allege that they were out to steal his wheat crop. In view of all these circumstances I am satisfied that the omission on the part of the learned Magistrate to make a memorandum of what he observed on the spot and to make it a part of the record did not in fact occasion a failure of justice.

7. The finding of the learned Magistrate as to whether the applicants had stolen the complainant's crops on the night in question is based on good evidence and has not been seriously challenged, apart from the question of law discussed above. The learned advocate for the applicants strenuously contended that in view of the value of the crop, viz. Rs. 2-8,0 the sentences of three months rigorous imprisonment and a fine of Rs. 50 in case of Basaram, and one and half months imprisonment and a fine of Rs. 25 in case of the other applicants are unduly severe.

8. Basram is a previous convict, and in his case, at any rate, the sentence is not severe. As regards the other accused the sentences should not be judged solely with reference to the value of the crop stolen on that occasion. But for the complainant and Hardeo interrupting their operations the major part of their gram crop might have disappeared in course of the night. I do not think any interference in the sentence is called for. The revision is dismissed. The accused shall surrender to their bail bonds to undergo the sentence.