

Nur Muhammad Khan Vs. Empror

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Court : Allahabad

Decided On : Jan-05-1923

Reported in : AIR1923All276; 71Ind.Cas.525

Judge : Ryves, J.

Appellant : Nur Muhammad Khan

Respondent : Empror

Judgement :

Ryves, J.

1. Nur Muhammad Khan was convicted under Section 411 of the Indian Penal Code by a Magistrate of the First Class and sentenced to one year's rigorous imprisonment and to a fine of Rs. 1,000. He appealed unsuccessfully and now comes up in revision before this Court. The charge against him is that of being in dishonest possession of stolen property, namely, 20 bales of khaki cloth belonging to Government. Most of the grounds taken refer to the findings of fact which I am not disposed to consider at this stage. The trial in the Trial Court was very careful and lasted nearly a year, and the Judge has given a detailed judgment in which he has reviewed the evidence. The main ground raised in revision is that the trial was rendered absolutely void owing to the circumstance that the Magistrate did not pronounce judgment in open Court. It appears that Mr. Wijahat Husain who tried the case was so severely hurt in a motor accident after he had done everything in

the case except delivering the judgment, that he was unable to come to Court and was obliged, as soon as he was able to do so, to proceed to England on long leave. He wrote his judgment, signed it and sent it to be delivered by another Magistrate who did deliver it. It is argued that, having regard to the mandatory words of Section 367 of the Criminal Procedure Code, this was an illegality which vitiated the whole trial. Attention is drawn to the words that the judgment shall be dated and signed by the presiding officer in open Court at the time of pronouncement. It is admitted that this was not done in the present case. The judgment was delivered by another Magistrate but it was written and signed and dated by Mr. Wijahat Husain who tried the case. It is not suggested that the fact that Mr. Wijahat Husain was not able to come to Court to pronounce the decision has in any way caused a miscarriage of justice or operated unfairly against the accused. Reliance has been placed on a decision of a Single Judge of this Court in *Empress v. Jia Lal A.W.N.* (1889) 181. There is no doubt that there are observations in judgment, more particularly in the second column of page 184 of the report, which suggest that in the opinion of Mr. Justice Straight an omission such as this renders the trial incomplete. That case, however, was a very exceptional one and several other illegalities had been perpetrated by the Trial Court and the case was sent back for re trial not merely on the ground that the Judge had sent his judgment to be delivered by a Magistrate. I cannot help thinking that if the only fault that could have been found against the procedure of the Judge in that case was his omission to pronounce the judgment the case would not have been sent back for re-trial. It seems to me that Section 537, 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 the judgment or other proceedings during trial applies. As I have said before, it is not suggested that the failure of the Magistrate to pronounce judgment in any way prejudiced the accused in the conduct of the case. The only omission, namely, that the Magistrate did not himself pronounce the judgment in this case was due to the fact that he was physically incapacitated. It seems to me that at the most his procedure in getting another Magistrate to pronounce this judgment was a mere irregularity completely covered by Section 537. I myself should have thought that the maxim *qui facit per alium, facit per se* would apply here. Suppose the

Magistrate was so hoarse as not to be able to audibly pronounce his judgment personally, and asked some one to read it out in his presence, surely that would be a compliance with the section. I suppose if the Magistrate had read his judgment into a gramophone and then sent it for reproduction in the Court that would have complied with the letter of the law, but to hold that nothing short of that is a sufficient compliance with the law when the Magistrate was physically unable to go to Court, renders the argument absurd. I am fortified, in my opinion, by a decision of Mr. Justice Lindsay delivered on the 12th of July 1921 in Criminal Revision No. 299 of 1921 which has not been reported. In that case the joint Magistrate, who tried the case, wrote the judgment and then went off into camp, leaving to be delivered by another Magistrate. It does not appear that in that case the Magistrate was incapacitated from delivering the judgment, but he found it more convenient, as he was going into camp, to ask another Magistrate to deliver it for him. It was argued that this was an illegal act which vitiated the whole trial. Mr. Justice Lindsay held that 'there can be no doubt that the joint Magistrate was wrong in acting in this way, regard! being had to the provisions of Section 367 of the Code of Criminal Procedure, but it is idle for the accused to contend that any prejudice or failure of justice has been caused by this mistake on the part of the joint Magistrate, and I hold that the mistake is covered by Section 537 of the Code of Criminal Procedure.' The only other point which has been pressed seriously is the question of sentence. It is urged that Lieutenant Reynolds who was subsequently convicted by this Court received a lesser sentence than the accused whereas he was really as guilty. The sentence no doubt is severe but, having regard to the fact that unless a person like the accused was prepared to assist Lieutenant Reynolds in disposing of this misappropriated or stolen property, the original offence would not have been committed. It has often been said that the receiver is worse than the thief. I see no reason to interfere and reject the application.