

Har Kishan Das Vs. Emperor

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Court : Allahabad

Decided On : Sep-25-1936

Reported in : AIR1937All127

Appellant : Har Kishan Das

Respondent : Emperor

Judgement :

ORDER

Bennet, J.

1. This is an application in criminal revision on behalf of a complainant against the procedure adopted by a special Magistrate of Benares, Capt. Bijaya Prasad Singh, who acquitted the accused after having framed the charge sheet under Section 420, I.P.C., on the ground that the complainant and his witnesses were absent. The record shows that the charge sheet was framed on 7th May 1936 and on the charge sheet the Court noted : 'Pleads not guilty : will produce defence.' On the order sheet on that date it was directed that the case be put up for further cross-examination on 11th May 1936 and the complainant to bring his witnesses for further cross-examination. On 11th May the Magistrate recorded a brief order in English on the order sheet stating:

Complainant and his witnesses have not arrived though I waited for more than an hour. The evidence which they had given cannot be taken into consideration

unless they had given themselves for cross-examination. I therefore acquit the accused of the charge.

2. This order was passed in spite of an application having been made by the complainant to the effect that the witnesses had not yet arrived but were coming and the Court was asked to adjourn the case for 15 minutes. Apart from any legal procedure it appears to me that the Court acted quite irregularly in refusing to grant such an application and this is especially the case where the Court was the Court of a special Magistrate where there are no fixed hours. The Court further appears to me to have neglected the provisions of Section 256(1), Criminal P.C. That section lays down that when the accused has pleaded to the charge sheet:

He 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 cross-examine any and if so which of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish the witnesses named by him shall be recalled.

3. Now the Magistrate did not record any reasons on 7th May for asking the accused this question forthwith nor has he entered on the order sheet or the charge sheet that he did put this question. Again on 11th May which was the next hearing after the charge sheet the Magistrate failed to record this question as put to the accused and he failed to record any reply of the accused to the question, It is incumbent on a Magistrate to make a record of this question and answer which are prescribed by Section 256(1), Criminal P.C. Moreover when an answer has been received that the accused desires to cross-examine the witnesses for the prosecution whose evidence has been taken the section proceeds to say that the witnesses named shall be recalled. It is true that in this case the Magistrate had directed that those witnesses should be present but by the use of the word 'recalled' I understand that Section 256(1) means that if the witnesses are not present then the Magistrate should issue process to ensure their attendance. Learned Counsel argued that the use of the word 'recalled' meant that the chaptrasi should call their names out, but I do not think that the English word bears this meaning. The Magistrate therefore acted irregularly in holding that the

complainant and his witnesses had defaulted. Moreover there is no provision in the Code entitling the Magistrate to pass an order of acquittal even in case the complainant and his witnesses had defaulted. If no charge-sheet had been framed and the, complainant had been absent, as this offence of Section 420, I.P.C. is one which may be lawfully compounded with the permission of the Court under Section 345(2), then Section 259 would have applied and the Magistrate might in his discretion have discharged the accused. But there is no section which empowers a Magistrate to act in such a manner after charge sheet has been framed in the trial of a warrant case.

4. In the trial of a summons case Section 247 entitles the Magistrate to acquit the accused where the complainant does not appear at any stage of the proceeding. It is true that a learned single Judge of this Court has delivered a ruling which lends some support to the contention on behalf of the accused. This ruling is *Emperor v. Nazir Husain* : AIR1930 All795 . That was a case in which a complaint had been made of a comparatively trivial assault of shoe-beating and a charge was framed and a date was fixed for the complainant to attend with his witnesses for cross-examination, and the complainant and his witnesses failed to attend on that date and the failure was not explained and the Magistrate waited till 2 p.m. This Court held that the correct procedure should have been for the Magistrate to find the accused not guilty under Section 258(1). Without expressing any opinion on this decision, I may point out that in that ruling there was a different ease. A date had been fixed for the complainant and his witnesses to attend for cross-examination. I understand that this meant that a date had been lawfully fixed in accordance with the provisions of Section 256(1), that is after the Court had taken the statement of the accused that the accused desired to cross-examine the complainant and his witnesses after the charge sheet. That point differentiates the ruling from the present case.

5. I consider that in the present case the Magistrate has failed to observe the procedure laid down by the Code and for these reasons I set aside the order of acquittal of 11th May 1936. I direct that the Magistrate should proceed with the case from the stage when the charge sheet has been framed and that when the case comes before him again he should enquire from the accused under Section

256(1) whether they desire to cross-examine the witnesses for the prosecution and if the accused names certain witnesses whom they desire to cross-examine further the Magistrate shall fix a date for those witnesses to appear and shall issue process for them to attend Court on that date and shall proceed with the trial from that stage according to law.

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