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Court : Madhya Pradesh

Decided On : Sep-05-1950

Reported in : 1951CriLJ77

Judge : Chaturvedi, J.

Appellant : Brandaban

Respondent : State

Judgement :

Chaturvedi, J.

1. This is an appeal preferred by Brandaban against his conviction by the learned Sessions Judge, Behind, under part 1, Section 304, Penal Code, and a sentence of three years' rigorous imprisonment.

2. Ram Prasad and Brandaban were committed to Sessions under Section 302 and Section 324, Penal Code. The Sessions Judge held that an offence under Section 324 was not established against either accused. He also held that guilt under Section 302, Penal Code was not established against Ram Prasad and he acquitted him. Brandaban was convicted as aforesaid. The State has preferred a revision for enhancement of sentence of Brandaban. I have heard both the appeal and the revision and this judgment will dispose of both of them.

3. On behalf of the appellant many legal points and points of facts have been raised. I however think that the law-points raised by Mr. Inamdar are important and strike at the very foundation of the case. I therefore take these points first.

4. The trial started with the aid of three assessors, 1. Chunnilal, 2. Bhola Singh and 3. Bhujawal Singh, The trial commenced on 27-10-1949. Bhujawal Singh did not attend after 22-11-1919, and Bhola Sing did not attend after 20-1.1950. The learned Judge proceeded with the case with the aid of only one assessor.

5. Section 284, Criminal P.C., provides that the trial should be held with the aid of at least three assessors and Section 285 provides for the contingency that:

If in the course of a trial with the aid of assessors, at any time before the finding, any assessor is, from any sufficient cause prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with 'aid of the other assessor or assessors.

6. The judgment of the trial Court does not show whether he had this section in his mind when he proceeded with the case in the absence of two assessors. The file does not show what prevented these two assessors in attending the Court, and whether the learned Judge considered that their absence was due to sufficient cause within the meaning of this section. It also does not show that the learned Sessions Judge took any steps which were practicable 'to enforce the attendance of these two assessors'. In Baddan v. Emperor A.I.R. (33) 1946 ALL. 253 : 47 Cr. L.J. 451 a Division Bench has held a failure to comply with this procedure as a material irregularity which will vitiate the trial.

7. The next contention urged by Mr. Inamdar is that the learned Sessions Judge thought fit to inspect the scene of occurence even in the absence of one assessor who had continued to attend throughout the trial. This assessor Chunni Lal's opinion was recorded on 18-3-1950. After the discharge of the assessor, the learned Judge ordered that at the request of the parties he would go to the scene of occurrence on 2-4-1960 and will deliver his judgment on the next day. On 2nd April he inspected the site and he made a note of his inspection which is on record of this case. This note of inspection has been prepared by him under the

provisions of Section 529-B, Criminal P.C. He then postponed his judgment from 8rd to 17-4-1950 and the judgment was delivered on that day. Though in his judgment he has not referred to his inspection note still the postponement of the judgment to another date after the inspection of the site clearly shows that the said inspection had created certain impressions in his mind about the site of the occurrence. In this case, the main question was whether the occurrence took place at Ganesha Teli's Chabutra or at Chhatta Dhobi's Teela The prosecution supported one theory and the defence another, The inspection of the Sessions Judge is not objected to. What is objected to is his overlooking the imperative provision of the Section 293, Criminal P.C. which runs as follows:

Whenever the Court thinks that the jury or assesors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the jury on assessors shall be conducted in a body, under the care of an officer of the Court, to such place which shall be shown to them by a person appointed by the Court.

8. If the inspection of the Bite was considered to be necessary by the learned Judge it must have been deemed to be a part of the trial and Section 268, Criminal P.C., enjoins that all trials before a Court of Session shall be either by jury or with the aid of assessors. In the present case the trial was with the aid of assessors and any proceedings taken by the Judge in the absence of the assessors must be held to be void and illegal. Raj Bahadur v. Emperor A.I.R. (21) 1934 Oudh 499 : 35 Cr. L.J. 1496.

9. The first part of Section 285 explicitly provide that the assessors shall attend throughout the proceedings, that is to say, that there shall be n break in their attendance, which shall be comomensurate with the entire continuance of the trial down to the time when the finding is made. In this case the proceedings relating to the inspection of the site are an important portion of the trial from the point of view of the accused. This portion of the trial was conducted without the aid of any assessor and to that extent the attendance was not continuously complete. This portion of the trial is therefore bad for want of jurisdiction. It has also caused

considerable prejudice to the accused, and the defect is not one which can be cured by s. S37, Criminal P. C or Section 167, Evidence Act. Mere ruling out of the inspection note from consideration in this case will not be sufficient and the case will have to be sent back.

10. The learned Deputy Government Advocate places reliance on King-Emperor v. Thiru-malai Reddi 24 Mad. 523 : 11 M. L.J. 241 F.B. where at p. 538 Bhashyam Ayyanger J., traced the history of earliest Indian Legislation which authorised European functionaries presiding in Courts of Session to constitute two or more respectable Indians to assist them as assessors with a view to the advantages derivable from their observations particularly in the examination of witnesses. The provision was made by the Legislature for Europeans administering justice in a foreign land and therefore deficient in their knowledge of the customs and habits of the parties and witnesses appearing before them and also deficient in judging of their demeanour in the witness box, having the benefit of the opinion of two or more respectable Indians as assessors possessing such knowledge and judgment. Such being the principle underlying the institution of assessors in India, the opinion of an assessor, according to the learned Judge in that case, is, in principle, on the same footing as the opinion evidence of a person specially skilled in foreign law, science, or Article The learned Judge also quoted Section 32 of Act VII 7. of 1843 and Section 324, Criminal P.C. of 1861 which ran as follows:

In a trial before a Court of Session not by jury the trial shall be conducted with the aid of two or more assessors as members of the Court.

11. The phrase 'as members of the Court' had disappeared in the corresponding Section 232 of Act X 10. of 1872 and was not re-introduced either in the Code of 1882 or in that of 1898. It was therefore held that assessors are not members of the Court of Session and the opinion of assessor: is not judicial opinion.

12. The learned Deputy Government Advocate contends, on the basis of the above ruling, that the opinion of the assessors, if not judicial opinion, should not be attached undue importance and the appeal should be decided on merits. In my opinion, though the assessors are not members of the Court of Session, still it is mandatory that the Court should be aided till the conclusion of the trial by at least

one assessor attending the trial throughout and giving his opinion: thus the assessors form an integral part of the Court and it is incumbent on the Court of Session to consider their opinion. If a Judge does not record the opinion of the assessors or after recording it proceeds further with the trial and without farther inviting the opinion of the assessors delivers judgment he virtually holds the trial without the aid of assessors and his finding cannot be regarded as one passed by a Court of competent jurisdiction. Even the venerable Judge, Bbashyan Ayyangar J. had to observe at p. 543 that

the opinion of an assessor is certainly not a judicial opinion in any sense, though one may not be so hyper critical as to object to its being characterised or referred to as quasi-judicial.

13. This observation has my respectful concurrence and in my opinion the contention of the Deputy Government Advocate is not tenable.

14. As regards the first point, the learned Deputy Government Advocate urges that the Division Bench of the Allahabad High Court in Baddan v. Emperor A.I.R. (33) 1946 ALL. 253 : 47 Or. LJ. 451 did not refer either to Section 537 or to the explanation to this section and therefore this case should not be held to be good law.

15. It is true that every material irregularity or illegality does not ipso facto vitiate a trial or call for the exercise of the powers of interference by the Appellate or Revisional Court. But the disobedience to an express provision as to a mode of trial cannot be regarded as a mere irregularity. ' The remedying of mere irregularities is familiar in most systems of jurisprudence ' observed the Lord Chancellor in Subrdhmanya Iyer v King.Emperor, 28 I. A, 257 : 25 Mad. 61 (P, C.)

but it would be an extraordinary extension of such a branch of adiministering the criminal law to say that such a trial as that which has taken place shall not be permitted, that this contravention of the Code comes within the description of error, omission or irregularity.

In P. Kottaya v. Emperor A.I.R. (84) 1917 P.C. 67 : 48 Cr. L.J. 533 Sir John Beaumont delivering the judgment of the Board referring to this case observed:

When a trial is conducted in a manner different from that prescribed by the Code as in Subrahmanya Iyer v. King-Emperor, 28 I. A. 257 : 25 Mad 61 P.C. the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code but some irregularity occurs in the course of such conduct, the irregularity can be cured under Section 537, and nonetheless so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code.

16. Now, Sections 284 and 285, Criminal P.C., deal with the mode of trial in the Court of Session with the aid of assessors. Previously, a trial held with leas than two assessors was null and void. After the amendment Act of 1923, there must be now at least three assessors, and if practicable four, The increase in the number of assessors was expected to give batter help to the Court and consequently more chances to the accused of getting justice. It was with this idea that Section 285 provided that the Court should, as far as possible, try to enforce the attendance of every assessor. Only in the two following cases the Court can proceed with the aid of one or two assessors: (a) if any assessor is from any sufficient cause prevented from attending throughout the trial, or, (b) if any assessor absents himself and it is not practicable to enforce his attendance.

17. The Court in the case before me could not have proceeded with the trial until and unless these conditions were fulfilled. The second condition came to be inserted for the first time in the Code of 1882 and was re.introduced in the Code of 1898. The intention of the Legislature clearly was that if any assessor absents himself the Court should endeavour to enforce his attendance. If it is not practicable, the Court should record it and only then can proceed further. If there is nothing to indicate that there was any endeavour to enforce the attendance there will be a presumption that the procedure adopted was one which the Code positively prohibited; at the same time it is possible that it may work actual injustice to the accused by a reduction in the number of the assessors who might have expressed their opinion in his favour. The trial will thus be held to be conducted in

a manner different from that presoribe3 by the Code and the trial will be bad according to Kottayha v. Emperor A.I.R. (34) 1947 P.C. 67 : 48 Cr. L.J. 533 and no question of curing any irregularity under Section 537 arises.

18. The trial was, therefore, not valid and must be set aside. The conviction, sentence and all other proceedings before me are annulled, and a new trial must be hold according to law. The file is, therefore, sent back to the Sessions Judge for disposal according to law. The appellant be released from jail forthwith and transferred to judicial lock-up. To this extent his appeal is allowed. Petition for revision is hereby dismissed. As the appellant has been undergoing imprisonment in jail since 17 4-1950 and before that has also remained as an under-trial prisoner for some time I think he should, during the course of the new trial, remain on bail on such conditions as may be imposed in this regard by the learned Court of Session.

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