

Trilochan Misra and ors. Vs. the State

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Court : Orissa

Decided On : Jul-23-1951

Reported in : AIR1953Ori81; 18(1952)CLT40

Judge : Ray, C.J. and ;Narasimham, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 342 and 540A

Appeal No. : Criminal Revn. No. 169 of 1950

Appellant : Trilochan Misra and ors.

Respondent : The State

Advocate for Def. : Adv. General, ;H. Mohapatra and ;R.N. Misra, Adv.

Advocate for Pet/Ap. : S.K. Ray, Adv.

Judgement :

Narasimham, J.

1. This revision is against the appellate judgment of the learned Additional Sessions Judge of Ganjam-Nayagarh maintaining the convictions of the petitioners under Section 147, I.P.C., and the sentence of four months rigorous imprisonment passed by a 1st Class Magistrate of Khurda. The learned Additional Sessions Judge further maintained the order under Section 106, Cr. P. C., passed by the

Magistrate directing the petitioners to execute bonds for Rs. 500/- each with two sureties of like amount for maintaining peace for a period of two years.

2. It is unchallenged that in 1947 acute party factions were prevailing between some residents of village Chasangar on the one hand and those of Mangalpur on the other in Banpur thana of Puri District. Several litigations, civil and criminal were fought out between the two factions and the occurrence out of which the present revision has arisen is said to have taken place in consequence of this bitter enmity. All the petitioners except Trilochan and Biswanath are residents of village Chasangar. The complainant's party are all residents of village Mangalpur. The prosecution case is that at about 10 A.M. on 8-7-1947 the petitioners lay in ambush and severely be laboured the complainants party consisting of about eight persons when they appeared near a brinjal field in Mangalpur. Four persons were injured on the complainant's side but none of the petitioners sustained any injury. Both the lower Courts have accepted the essential facts of the prosecution case regarding the presence of the sixteen petitioners at the spot and their joining in the assault on the complainant's party. The trial court, however, believed the prosecution evidence regarding the specific part ascribed to some of the petitioners and convicted them under Sections 323, 324 and 325, I. P. C., in respect of the assaults committed by them. The lower appellate Court however thought it unsafe to accept the prosecution evidence regarding the part played by each of the petitioners in the commission of the crime; but it accepted the prosecution story regarding the presence of the sixteen petitioners at the spot and their participation in the assault on the complainant's party in furtherance of their common object. Consequently, the charge under Section 147, I. P. C., against all the 16 petitioners seems to have been established beyond any doubt and as the finding on this point is a pure finding on facts, in which the two Courts below have taken a concurrent view, I am not inclined to interfere.

3. Mr. Ray learned counsel for the petitioners raised the following two important points of law.

(1) The trying Magistrate wrongly applied section 540A, Cr. P. C., during the trial of the accused and consequently the entire proceeding was vitiated inasmuch as a

substantial part of the trial took place in the absence of some of the accused persons.

(2) There has not been adequate examination of the accused persons under Section 342, Cr. P. C., and the accused have been materially prejudiced thereby.

4. To appreciate the first point it is necessary to briefly recapitulate certain facts which took place during the trial. The trial was held by three Magistrates in succession and Mr. S. Mohanti was in charge of case in the middle stage. On 5-3-48 when the trial continued before him all the accused persons were present. On the next date 23-3-48, a petition was filed on behalf of the accused persons requesting the Magistrate to exempt all of them except Biswanath from personal attendance inasmuch as they were poor cultivators and they would be put to very heavy expenditure in appearing at every date of the trial. The learned Magistrate passed the following order: 'Allowed. Put up with records on the date fixed.

' Then on 13-5-48 he passed a formal order in the order-sheet to the following effect. 'The prayer of the accused for being represented is allowed because it is difficult for all the 16 accused persons to attend personally every time as they are earning members. To avoid delay and unnecessary adjournments this procedure is very necessary.'

Then on several succeeding dates two or three of the accused persons appeared in Court and the remaining accused persons were represented by a lawyer, their attendance having been dispensed with under Section 540A, Cr. P. C. Mr. Ray's main contention is that Section 540A, Cr. P. C., is wholly inapplicable to the present case and consequently the Magistrate had no jurisdiction to proceed with the trial in the absence of any of the accused persons. He urged that the words 'incapable of remaining before the Court' occurring in Sub-section (1) of Section 540, Cr. P. C., related to some sort of incapacity from attendance arising either out of illness or some other reason such as social ban or peculiar customs of the class to which the parties belong. There seems to be no doubt about the correctness of this contention and I would agree with him that mere inconvenience or heavy expenditure that is likely to be caused to the petitioner by being required to attend at the Magistrate's Court on every succeeding date of hearing will not render them

"incapable of remaining before the Court' so as to attract the provisions of Sub-section (1), Section 540A, Cr. P. C. The Magistrate therefore acted clearly against the provisions of law in allowing most of the petitioners to be represented by a lawyer and dispensing with their personal attendance.

5. But the question is whether this error committed by the Magistrate is itself sufficient to vitiate the proceeding. Mr. Ray urged that the trial which took place when some of the accused persons were absent was null and void as being clearly against the mandatory provisions of the Code contained in Section 353. The Government Advocate however invited our attention to an Allahabad decision reported in -- 'Emperor v. Radha Raman', AIR 1930 All 817, where on facts similar to the present case it was held that such an error was a mere irregularity curable under Section 537, Cr. P. C. The order of the Magistrate exempting most of the petitioners from personal attendance was passed on their special request with a view to relieve them of the inconvenience and heavy expenditure arising out of their appearance in Court on every date of hearing. The Magistrate therefore granted this indulgence on their own special request and it seems rather strange that the petitioners having thus induced the Magistrate to apply the provisions of Section 540A, Cr. P. C., in their own favour should now utilise that indulgence as an argument for showing that the entire trial is null and void. It is however unnecessary in this case to decide whether non-compliance with the provisions of Section 540A, Cr. P. C., is an illegality which goes to the root of the trial or a mere irregularity curable under Section 537, Cr. P. C. I would reserve my opinion on this point for a future occasion.

6. The petitioners have been harassed by a protracted trial which commenced sometime in 1947 and continued till 16-11-1949. Since then, nearly two years have been taken in prosecuting the appeal before the Sessions Judge and the revision before this Court. Even if I take the view that an incurable illegality has been committed, the only alternative course would be to remand the case for rehearing. But in view of the inordinate delay that has already taken place, I do not think it desirable to protract the trial further. The learned Magistrate has passed an order under Section 106, Cr. P. C., binding down the petitioners for a period of two years and this should suffice for preventing further breach of peace between the

parties. Taking all these factors into consideration, I am not inclined to interfere in revision, with the conviction of the petitioners under Section 147, I. P. C, solely because the Magistrate wrongly applied the provisions of Section 540A, Cr. P. C.

7. As regards the inadequate examination of the petitioners under Section 342, Cr. P. C., the learned Sessions Judge has fully met that argument. Such inadequacy will be mere irregularity which will not suffice for setting aside the conviction unless it can be shown that the petitioners have been materially prejudiced. If the lower court had drawn any adverse inference against the petitioners on account of their conduct or on account of their failure to explain certain circumstances appearing against them then the inadequacy of their examination under Section 342, Cr. P. C., in respect of those matters would have been prejudicial to them. But, in the present case, no such consideration arises at all. All the petitioners took plea of alibi and the whole case depended on the evidence of the eye-witnesses regarding their presence and participation in the assault. The petitioners examined three witnesses on their behalf and they were also properly represented by lawyers and they promised to file written statements though no such statement was filed eventually. Taking all the facts into consideration I do not think that any material prejudice has been caused by the unsatisfactory way in which they were examined under Section 342, Cr. P. C.

8. On the whole, therefore, I am not inclined to interfere with the conviction. As regards the sentence, however, in view of the harassment caused by the protracted nature of the trial and the order under Section 106, Cr. P. C. passed against the petitioners there seems to be no necessity for sending them to jail to serve out the substantive sentence of imprisonment. While maintaining the conviction of the petitioners under Section 147, I. P. C., I would alter their sentence to a fine of Rs. 25/- each; in default they should undergo rigorous imprisonment for fifteen days each. The order of the trial court directing the petitioners to execute bonds for Rs. 500/- each with two sureties of like amount for maintaining peace for a period of two years is maintained. Subject to this modification in the sentence the revision petition is dismissed.

Ray, C.J.

9. I agree.

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