

Hadibandhu Misra Vs. King

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Court : Orissa

Decided On : Aug-08-1949

Reported in : AIR1950Ori245

Judge : Ray, C.J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 252(2) and 256

Appeal No. : Criminal Revn. No. 321 of 1948

Appellant : Hadibandhu Misra

Respondent : King

Advocate for Def. : B.K. Pal, Adv. and Government Adv.

Advocate for Pet/Ap. : M.S. Rao, Adv.

Disposition : Petition allowed

Judgement :

ORDER

Ray, C.J.

1. The petition is by the complainant. He feels aggrieved by the order of the trying Magistrate (Shri S. S. Roy) refusing to examine some more witnesses for the prosecution at the stage of the trial where Section 256, Criminal P. C., came into

operation.

2. The facts are that after a long and chequered career, the criminal case started by the petitioner, came to the file of Sri S. S. Roy for disposal. On the date, he received the file, he asked the complainant (petitioner) to produce his witnesses on the following date, on the said date, that is 19th August 1948, the complainant could not be present in Court and an application for excusing his absence was filed. At his instance, the case was adjourned, but the complainant was required to file a list of witnesses within two days. Thereupon, three witnesses were summoned for the prosecution and were present in Court on the next date. They were examined and (partially) cross-examined before the charge was framed. After charge, they were further cross-examined and discharged. The accused was asked to plead. He pleaded not guilty and claimed trial. He was asked to produce his witnesses on the next date. On that very day, prosecution asked for leave to summon some more witnesses. This was disallowed with the following observations of the Magistrate :

'The case was transferred to my file on 17th July 1948, and the complainant was asked to produce his witnesses on the next date, i. e., 19th August 1948, on which the complainant did not turn up and he was asked to file a list of witnesses without fail within two days, which the complainant has not complied with till now and instead filed a petition to summon three witnesses all of whom have been already examined and cross-examined and the accused examined. Just before fixing up a date for defence the complainant files a petition to examine some more witnesses. In view of the fact stated above the petition is rejected.'

3. This order of the learned Magistrate is the subject-matter of attack in this revision. It is claimed by the learned Government Advocate that the Magistrate could not, without violating the provisions, which are as mandatory as anything can be, of the Criminal Procedure Code, allow the prosecution an opportunity to call more witnesses. He relies very strongly upon a Full Bench decision of the Lahore High Court in the case of Heman Ram v. Emperor, A. I. R. (32) 1945 Lah. 201 : (47 Cr. L. J. 143 F. B.), which lays down as emphatically as it can that considering the scheme of the code, the words 'remaining witnesses', occurring in

Section 256, should mean those witnesses who have been named by the complainant or any public servant in charge of the prosecution case under Sub-section (2) of Section 252. This conclusion, according to their Lordships, owes itself to three considerations: (1) That the words 'the evidence of any remaining witnesses, for the prosecution, shall next be taken etc.' were introduced into Section 256 of the Code of 1898 as consequential to the amendment of Section 284 of the said Code by insertion of the words 'or at any previous stage of the case'. Under the next preceding Code of 1882, charge could be framed only when such evidence and examination have been taken and made, (ii) That any other interpretation would irreparably prejudice the accused in his defence enabling, as it would, new and fresh evidence to be sprung upon him, and (iii) That the accused should lose the advantage of making such statements as he pleases after hearing the examination of all the witnesses the prosecution has to examine.

4. The necessary research for pragmatic treatment of the subject adopted by the Lahore High Court should be carried a little further in order to reach a more convincing result, particularly so, as it has given a contrary indication to what would result from giving a full plain grammatical meaning to the words 'any remaining witnesses shall next be taken up.' The words 'any remaining witnesses' are very wide, but it is sought to be limited to these only that have been named under Section 262 (2) but not examined so far. My first objection to this construction is that if it were so intended, the words 'the remaining witnesses' instead of 'any remaining witnesses' should have been used. It cannot be presumed or pre-supposed that the draftsman should commit a grammatical mistake such as that unless he had an intention to convey a wider meaning. Witnesses for the prosecution would be those that are acquainted with the facts of the prosecution case and are able to give evidence for it of them such as have not been examined till then shall necessarily be 'remaining witnesses' The object of using 'any' instead of 'the' is to widen rather than to limit the meaning of the words that follow.

5. I shall now address myself to a historical retrospect of the legislation on the subject. The Code, previous to that of 1872, could not be made available to me. I shall, therefore, start with that Code. In that Code, Sections 190, 191, 192, 193

and 194 and 213 to 221 (both inclusive) proscribe the procedure for trial of warrant cases. Of them, Sections 193 and 193 are of general character empowering the Magistrate to summon and examine any witness at any stage of a proceeding, whose evidence, he considers essential to the enquiry or trial and ancillary to examine the accused from time to time without previous warning. Section 194 relates to adjournment of inquiries and trials. Sections 190 and 191 correspond approximately to Section 282 though with some significant difference in their respective texts. Section 190 enjoins upon the Magistrate to examine the complainant and 'of such persons as are stated to have knowledge of the facts which form the subject-matter of accusation and the attendant circumstances.'

The next section, in chronological order, is Section 215 and it deals with discharge. Explanation III of the section prohibits such an order until the evidence of witnesses named for the prosecution has been taken. It may be noted that the word 'named' in the explanation refers to the facts of naming of witnesses for the prosecution which must be either by the complainant or by any prosecuting officer. This envisages Section 352 (2) of the Code of 1898 which is but a reproduction of Section 362 of the 1872 Code. Section 216 deals with framing of charge. This more or less corresponds to Section 254 of the Codes of 1882 and 1393 (the present one). It did not, as it stood till the amending Section 16 of Act XI [11] of 1874, indicate at what stage of the taking of prosecution evidence it could be framed. That it could be framed before examining all the prosecution witnesses could not be doubted. The section opens with the words 'if the Magistrate finds that the offence is apparently proved' this might happen according to the Magistrate, before the taking of entire prosecution evidence or might not happen at all till after it--in the latter case, the accused had to be discharged under Section 215 of the Code. Explanation III, already referred to, was added to the section in 1874. The framer of the latter Act gave the following explanation of the necessity for the addition:

'When the complainant has been examined and a prima facie case established against the accused, there seems no reason why the Magistrate should not frame the charge without waiting for all the witnesses for the prosecution to be examined.' (see commentaries by H. T. Prinsep on the Code of Criminal

Procedure Acts, X [10] of 1872 and XI [11] of 1874 Fifth Edition, 1875, page 190.)'

The same notable commentator, in his commentary of 1875 in connexion with its effect on the accused's defence, observes at page 190, in the following words.

'It is impossible to predict the exact effect of this alteration of the law on trials of warrant cases, to which it alone applies. Under Sections 217, 218, the accused persons is required to enter up on his defence as soon as the charge baa been framed, read and explained to him, it would be obviously unfair to the accused to place him at this disadvantage of exposing his defence before the evidence for the prosecution has been closed or been font in by the police. The Code nowhere requires that all the witnesses for the prosecution shall be examined, unless the Magistrate contemplates to discharge the accused (Section 215. Espln. III), and Section 362 empowers the Magistrate to summon such of these persons as he thinks necessary.'

6. The clear position under the Code, read with or without the amendment of 1872, already referred to, was that a Magistrate could frame a charge as soon as he thought it was apparently proved or, in the words of later Codes, that the evidence gave grounds for presuming that the accused had committed an offence. At the next stage, the accused was called upon to plead and enter upon defence in course of which, he could recall and cross-examine the prosecution witnesses. It is not clear whether he should cross-examine the prosecution witnesses before or after examination of his own witnesses. However, there was no express provision entitling the prosecution to examine his remaining witnesses but the prosecution's right to do so was considered inherent in the scheme of the Act. I shall here quote a passage from an unreported judgment of the Madras High Court (12th September 1864, 18th December 1865).

'It is unnecessary for Magistrate to examine more witnesses than are sufficient to convince him of the truth of the charge and in that view be is competent under Section 342 to put questions to accused. The answers given to these questions if any are given will generally have at great effect as to the witnesses necessary to be examined on the part of the prosecution, and if after the complainant has been examined questions put to the accused elicit answers which leave no doubt as in

the commission of the offence, there seems to be no reason why the Magistrate should not then frame the charge and call upon the accused to plead.'

Emphasis is upon the underlined (here italicised) portions of the above quotation. The provision that would, in such cases, empower the Magistrate to summon and examine the 'remaining prosecution witnesses' would necessarily be the general provision contained in Section 351 and the specific provision applicable to warrant case trials contained in Section 192 of the Code. But nothing in these provisions could prevent the Magistrate from examining the said remaining prosecution witnesses, after the accused exposed and entered upon his defence altogether.

7. The Code of 1872 was succeeded by that of 1882. This latter Code was completely redrafted but there was hardly any change in the scheme thereof in the procedure of warrant cases trials chap. XXI, (Sections 251 and 259) relates the procedure. Section 252 which reads:

'When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution.

The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence of the prosecution and shall summon to give evidence before himself such of them as he thinks necessary.'

replaces as nearly as may be Sections 190 and 362 (para 1) of the preceding Code with slight variation in the language. According to it, the Magistrate shall examine the witnesses produced by the prosecution, such of them as are stated to have knowledge of the facts and circumstances relevant to the prosecution case before the accused. It may be urged that there is room for a contention that under Section 190 the Magistrate was bound to take all evidence either produced or named by the prosecution. But I have already shown that under those sections read with Section 216, the Magistrate could frame a charge before exhausting examination of all the witnesses for the prosecution. In this connexion, Section 254 needs examination. The section reads: (Code of 1882).

'If when such evidence and examination have been taken and made, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.' Emphasis is upon the words such evidence 'such evidence' must, in my view, not mean 'all the evidence.' This appears from the difference in language of the next preceding Section 253. It relates to discharge of accused and it has prescribed therein that if upon taking all the evidence referred to in Section 252 and examining, if necessary, the accused, the Magistrate finds no case against the accused, he will discharge him. I will contrast the words 'all the evidence' in this section with 'such evidence' in Section 254. Such evidence cannot have reference to 'evidence' referred to in Section 253. 'Such evidence' necessarily, therefore, must mean 'such evidence as may be produced in support of the prosecution referred to in Section 252.' And in a more extended sense may include 'the evidence of such of the persons named as persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution as the Magistrate thinks necessary to summon.'

The net result is that Section 254 contemplates a case of framing the charge before exhausting examination of all the prosecution witnesses either produced or named. The remaining witnesses as named but not summoned may have to be examined if need be after the accused produces and enters upon his defence. As a part of making out his defence, he could under Section 256 recall and cross-examine the prosecution witnesses. This is the result of the combined operation of Rs. 256 and 267. Here too, the accused is at a disadvantage that after he exposes his defence and enters upon it, the prosecution can examine farther witnesses. This could be achieved by invoking the Court's power under Section 540 which consists of two parts first discretionary and the second obligatory with the Magistrate. The point that I am driving at is that in all the previous Codes, the Magistrate's power to frame the charge before examining all the prosecution witnesses and his power and the prosecution's right to examine the rest of the witnesses after the accused enters upon his defence had been provided for. The object of the amendment in the Code of 1898, therefore, was neither to confer any

new power upon the Magistrate by inserting the words 'or at any previous stage of the case' in Section 254 nor to give the prosecution any fresh right to examine the remainder of his witnesses by insertion, in the text of Section 256, of 'the evidence of any remaining witnesses for the prosecution shall next be taken.' If any improvement was either aimed at or achieved by the amendment of a. 254, it was this that unlike under the previous Code, the Magistrate could frame a charge after merely examining the complainant and before examining any of the witnesses either produced or named by him which latter he was bound to do under the Code of 1882. This change, however, does not affect the position that we are considering. Section 256, however, relieves the accused from the most embarrassing and damaging situation of his having had to disclose his defence before the prosecution exhausts examination of all its witnesses. That the prosecution ought to have the right to adduce some evidence after the accused claims to be tried is nothing but a square deal to the prosecution without any corresponding disadvantage to the accused. It has been observed by Munir J. in the Lahore Full Bench case *Heman Ram v. Emperor* A. I. R. (32) 1945 Lah. 201 : (47 Cr. L. J. 143 F.B.) that the accused may be embarrassed to make a statement as to his defence before the close of the prosecution but this does not necessarily arise in all cases and in all eventualities. He is simply either to refuse to plead or not to plead or claim to be tried and to state whether he should cross-examine and if so which of the witnesses for the prosecution whose evidence has been taken. This process would not involve him in any exposure of his defence. The Legislature safeguards his interest by compulsory closure of the prosecution case whether the prosecution wishes it or not before the accused is called upon to enter upon his defence and produce his evidence. The Legislature has also secured for the benefit of the accused that after all the prosecution witnesses are examined and cross-examined he shall be examined under Section 342 of the Code in relation to circumstances that appeal against him. For these reasons, with my utmost deference to the decision of the Lahore Full Bench. I cannot persuade myself to be in accord with it.

8. I shall next refer to certain decisions which support the view that I have taken. In the case of *Emperor v. Nagindas Narottamdas*, A. I. R. (29) 1942 Bom. 214 : (43 Cr. L. J. 761), Sir John Beaumont C. J. (as he then was) held that the learned

Sessions Judge was wrong in thinking

'that remaining witnesses means (in Section 256) those who were In the list of witnesses who could have been examined by the prosecution in the first instance, but were not actually examined under Section 252. It seems to me that there is no justification for limiting the words in that sense. I think that Section 256 clearly enables the Crown (prosecution) to examine witnesses who had not been examined, or whose names had not been disclosed before the charge was framed.'

I am entirely in accord with great respect with this view.

9. In the case of Crown Prosecutor, Madras v. C.V. Ramanujulu Naidu, A. I. R. (31) 1944 Mad. 169 : (45 Cr. L. L. 401) Horwill J. of Madras High Court having had to interpret Section 256, observes as follows:

'One cannot presume that because the Magistrate has trained a charge, that all the prosecution evidence has been taken. The expression 'remaining witnesses for the prosecution' in Section 256 (1) presumably means the remaining witnesses that the prosecution wishes to examine.'

10. This is the interpretation given to this expression by Chandavarkar J. in Emperor v. Percy Henry Burn, 11 Bom. L. R. 1153: (4 I.C. 268:10 Cr. L. J. 530), an opinion with which I respectfully agree. It seems to me the general rule of law and equity is that the accused (prosecution?) is at liberty to examine whomsoever it pleases until the prosecution case has been closed...the prosecution is not closed until the defence begins.

11. In the case of Hansraj Harajiwan v. Emperor, A. I. R. (27) 1940 Nag. 390 ; (42 Cr. L. J. 208), Gruer J. held :

'It seems to me that if witnesses have been accepted by the Court as competent for the prosecution at any stage before the point (or farther examination under Section 256 arrives, even if that stage is after charge, they come under the category of 'any remaining witnesses.' I, therefore, prefer the Bombay ruling on the point.'

12. In the case of *Emperor v. Percy Henery Burn*, 10 Cr.L.J. 530; (4 I.C. 263: 11 Bom. L.R. 1153), Chandavarkar J. observed at p. 531:

'They complained that contrary to law the Magistrate had allowed the prosecution, after the charges had been framed against the accused and they had made statements, to examine fresh witnesses, who had not been named originally and summoned as required by Clause 2 of Section 252, Criminal P. C. This procedure, it was contended, was a direct violation of the terms of Section 256 of the Code, which provides that after the charge has been framed and the accused has pleaded not guilty 'the evidence of any remaining witnesses for the prosecution shall next be taken.' According to the learned counsel, 'any remaining witnesses' must refer only to those who as required by Section 252, Clause 2, have been named by the complainant and summoned by the Magistrate before the framing of the charge. I do not think that the expression in question is necessarily limited to those witnesses. It is wide enough to include any witness, who according to the prosecution, is able to support its case, though he has not been summoned provided of courts that he is not sprung upon the defence all of a sudden and sufficient opportunity is given to the latter to prepare for the cross-examination of the witness.'

13. Even assuming that the view adopted by the Full Bench of the Lahore High Court is correct, this rule has to be made absolute. Their Lordships have said that the filing of a list of witnesses either in the charge-sheet filed by the investigating officer (or by the complainant) would not relieve the Magistrate of the duty cast upon him by Sub-section (2) of Section 252, Criminal P. C. It is a duty of the Magistrate which must be performed in all its essentiality. Such a duty according to the Full Bench decision, he can be relieved of only when either the complainant or the public prosecutor has intimated to the Magistrate that he has closed the prosecution case, the mere filing of a list of witnesses will not. This leads us to consider whether the learned Magistrate, in this case, has discharged the function assigned to him under Sub-section (2) of Section 252. On his own showing, the complainant has never told him the names of all persons, acquainted with the facts of the case. He, at that stage, probably in order to enable the Magistrate to frame the charge, might have examined some of his witnessed

knowing full well that he could, if he liked, examine further witnesses after their cross-examination after the framing of the charge was over. What the law requires is that it must be brought home to the complainant or whosoever is in charge of the prosecution that; he is required to disclose the names of all the persons known to him, to be acquainted with the facts of the case. This ascertainment which is the duty of the Magistrate has never been done in this case. From my experience at the bar, I know it is seldom performed by Magistrates. They should please take note for the future. Under the circumstances giving the words 'any remaining witnesses' the limited meaning which the learned Government Advocate contends for, the prosecution should still be entitled to examine more witnesses. As observed by Chandavarkar J. the Magistrate was simply to see that nothing is sprung as a surprise upon the accused or nothing is done by way of prejudicing him in his defence. I should allow this petition on the limited ground that the Magistrate not having exercised his function under Sub-section (2) of Section 252, nor the complainant having ever been told by the Magistrate to disclose the names of all his witnesses nor having it been intimated by the complainant that he closed the prosecution case, it would be denying justice to the complainant not to allow him to examine further witnesses whom he wants to examine being persons acquainted with the facts of the case. In my opinion, however, if the prosecution discovers a fresh witness or witnesses competent to depose but not cited earlier, it will have the right to examine before the accused enters upon his defence. Mr. Pal, who followed the learned Government Advocate, as representing the private party (the accused) urges that to allow the prosecution an opportunity to examine fresh witnesses will affect him injuriously with regard to his right of cross-examination. What he means to say is that had the new witnesses sought to be examined been examined along with the prosecution witnesses already examined, he should have cross-examined them in the light of the former and should have got an opportunity of confronting them with varying statements of several witnesses on a common topic. This prejudice, however, can be easily avoided by directing the Magistrate to give him every facility in order to relieve him of those disadvantages after he finishes cross-examining the new witnesses examined by the prosecution to recall the prosecution witnesses already cross-examined and discharged for the purpose of further cross-examination. This would remove the

only grievance that the accused can make out of it. In consideration of what I have said above, I would hold that the Magistrate is wrong in disallowing the complainant to examine further witnesses, He should now proceed from that stage and summon witnesses named by the complainant and allow them to be examined and cross-examined. He should allow the accused to further cross-examine the former witnesses if they so like.

14. I should, therefore, allow this petition and make the rule absolute.

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