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Dara Singh and anr. Vs. the State

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Court : Punjab and Haryana

Decided On : Sep-11-1951

Reported in : AIR1952P& H214

Judge : Bhandari,; Khosla and; Soni, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 342, 374, 401 and 423; Indian Penal Code (IPC), 1860 - Sections 302

Appeal No. : Criminal Appeal No. 121 of 1951

Appellant : Dara Singh and anr.

Respondent : The State

Advocate for Def. : S.M. Sikri, Adv.-General,; D.N. Awasty, Adv. for; Adv.-G

Advocate for Pet/Ap. : J.G. Sethi,; R.L. Kohli and; R.N. Kohli, Advs.

Disposition : Appeal dismissed

Judgement :

Soni, J.

1. Dara Singh 'alias' Dari and his brother Jndar Singh along with two others were sent up to take their trial for having committed the murder of Sardara Singh on the 19th of October, 1950, at Dulchipur. They were committed to take their trial by Mr.

Hardayaj, Singh, Magistrate 1st Class and the trial was held by Mr. Gurdjal Singh, Additional Sessions Judge, Amritsar. The learned Judge found Dara Singh and Indar Singh guilty under Section 302, Indian Penal Code, and sentenced Dara Singh to death and Indar Singh to transportation for life. He found that the case against the companions of these persons was not proved and gave them the benefit of the doubt and equitted them. This order of the AdditionalSessions Judge was passed on the 26th of March, 1951, whereupon the convicts appealed to this Court and the case was also sent for confirmation of the sentence of death under the provisions of Section 374 of the Code of Criminal Procedure.

2. The story against the appellants was simple enough. In broad daylight the two appellants and their two companions came armed to a pond where the deceased was bathing his buffalo. One of them, i.e., Indar Singh instigated the others to kill the deceased Sardara Singh. The other three went into the pond and killed Sardara Singh in water and drowned his body there in the pond. This incident was witnessed by a number of persons some of whom were produced before the trial Court. After the commission of the offence, all four ran away. All the accused were arrested a day later. From the house of one of them (Indar Singh) were found a shirt, a chad-dar', a 'barchha' and a 'takwa' which were later found to be stained with human blood. The 'barcha' was the one used by Dara Singh appellant.

3. The motive alleged was that Dalip Singh, the brother of the two appellants, was murdered by Sardara Singh deceased, his brother Gurmukh Singh, one of the eye-witnesses to the present occurrence, and two others about a year earlier. All the four had been convic-ed by the Sessions Judge, but this Court acquitted Sardara Singh deceased and his brother Gurmukh Singh who is the first in present in this case.

4. The Committing Magistrate examined the accused and put some questions to them. The Additional Sessions Judge at the trial had the statements of the accused made by them before the Committing Magistrate read out and questioned the accused about them and asked other questions of his own. The accused produced no defence. The assessors found all the four accused guilty. The Additional Sessions Judge convicted the two appellants and ac- quitted their two

companions.

5. In the hearing before this Court a preliminary objection waa taken by the learned counsel for the appellants. We have not heard the appeal on the merits but are only dealing with the preliminary objection. The objection was that the provisions of Section 342, Criminal P. C., had not been complied with and that as they had not been complied with, the trial was vitiated. Reference was made to the case of 'TARA SINGH v. THE STATE', recently decided by their Lordships of the Supreme Court on the 1st of June, 1951 (Cr. A. 14 of 1951). In the course of the judgment in that case the Hon'ble Mr. Justice Vivian Bose dealt with the procedure which should be followed by a Sessions Judge in examining accused persons taking their trial before him & held that the Sessions Judge should himself examine the accused after the prosecution evidence has been concluded and not merely content himself with having the statements of the accused made before the Committing Magistrate read out and then asking them whether they were correct and not asking further questions covering the same points which had been asked by the Committing Magistrates. He said:

'I cannot stress too strongly the importance of observing faithfully and fairly the provi-sions of Section 342. Criminal P. C. It is not aproper compliance to read out a long string of questions and answers made in the committal Court and ask whether the statement is correct. A question of that kind is misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true, or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must, therefore, be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is, therefore, in no fit position to understand the significance of a complex question. Fairness

therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand.'

His Lordship, however, went on to say:

'I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned."

In the particular case which was being dealt with by the Supreme Court his Lordship was of the opinion that the disregard of provisions of Section 342, Criminal P. C., was so grave that he felt that there was a gross likelihood of prejudice. The learned Judge then went into other errors in that case and came to the conclusion that having regard to all what has happened during the trial of that case, the case should be retried and ordered a retrial.

6. In the case which is now before us it was urged by Mr. Sethi, learned counsel for the appellants, that the provisions of Section 342, Criminal P. C., had not been complied with by the learned Additional Sessions Judge and Mr. Sethi's argument was that according to the ruling of their Lordships of the Supreme Court the trial had been vitiated and that the only order that we could pass in this case was to order a retrial.

7. On behalf of the State it has been urged that the Supreme Court has not held that in every case there must be a retrial. They have held that the non-observance of the provisions of Section 342, Criminal P. C., is an irregularity which is curable and that they have held that each case must be examined and it should be found out whether the irregularity has occasioned prejudice or is likely to have occasioned prejudice. The argument is that in the pre-sent case the irregularity is not of such a na-ture, but to be on the safe side it is possible to set matters beyond doubt by examining the convicts in this Court. The argument is that the Court of appeal has all the powers of a trial Court and that an appeal is a continuation of

the proceedings before the trial Court and a murder reference is certainly such. Under Section 374, Criminal P. C., it is provided that when a Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court. Section 375, Criminal P. C., provides that if when such proceedings are submitted the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point, bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session. Such inquiry shall not be made nor shall such evidence be taken in the presence of jurors or assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken.

8. It is argued on behalf of the State that under the provisions of Section 375, Criminal P. C., it is distinctly stated that the High Court may, if it thinks that further inquiry should be made into any point bearing upon the guilt or innocence of the convicted person, make such inquiry itself, and the argument is that questioning the accused on evidence adduced against him is making an inquiry from him on points bearing upon his guilt or innocence and if the Additional Sessions Judge has not made as complete an inquiry as he might have made, the High Court, if it thinks that further inquiry js necessary and desirable in a particular case, can do it itself. Under Section 428 of the Code of Criminal Procedure, similar powers are given to a Court of appeal. Mr. Sethi, on the other hand contends that neither S, 428 nor Section 375, Criminal Procedure Code, contemplates the examination of the accused. According to him they contemplate cases where evidence, oral or documentary, is to be examined by the Court or where, for instance, an inquiry on matters based on personal inspection by the Court is necessary, the provisions of the two sections come into operation.

9. The Supreme Court in its judgment never dealt with the powers of the High Court. It was dealing with the question of errors committed by the Sessions Judge, and having found that the errors in the case, which their Lordships were dealing with, were of a grave kind, they ordered a retrial. It was never argued before the Supreme Court, nor did their Lordships consider the question whether the High

Court, under the provisions of Section 428 or Section 375, Criminal Procedure Code, could examine the accused and cure the irregularity if in a proper case it thought that the irregularity was such that it should be cured. It might also perhaps be argued that the power can be exercised by the High Court under Section 342, Criminal Procedure Code, itself, or might be exercised under Section 561-A, Criminal Procedure Code, if circumstances of a case so justify it. Because the judgment of their Lordships of the Supreme Court is likely to affect a very large number of trials in which orders have been pronounced by Sessions Judges in this State, we cor-sider that the matter which has been raised by the counsel for the State in this case is of far reaching importance. We accordingly direct that papers be laid before the Hon'ble the Chief Justice with our recommendation that the case be laid before a Bench of as large a number of Judges as he considers fit to consider the following question: 'It in an appeal, reference or revision the High Court is of the opinion that the provisions of Section 342 of the Criminal Procedure Code have been insufficiently complied with, is it within the power of the Court under the provisions of Section 428 or 375 or any other section of the Code or of any other law to examine or further examine the convicts? If so, under what circumstances?'

10. As we are dealing with a murder case, and as it is important that where sentences of death have been passed, the murder reference should be disposed of quickly, we recommend that this reference be heard by the Full Bench as early as possible.

Bhandari, J.

11. I agree.

OPINION OF THE FULL BENCH

Khosla, J.

12. The following question has been referred to this Full Bench for decision:

'If in an appeal, reference or revision the High Court is of the opinion that the provisions of Section 342 of the Criminal Procedure Code have been insufficiently complied with, is it within the power of the Court under the provisions of Section 428 or 375 or any other section of the Code or of any other law to examine or further examine the convicts? If so, under what circumstances?'

13. The matter arose in the following manner. Four persons were tried upon a charge of murder by a learned Judge who convicted two of them. One of them, Dara Singh, was sentenced to death and the other, Indar Singh, to transportation for life. The convicts filed an appeal to this Court and the casg of Dara Singh was also referred by the learned trial Judge under Section 374 of the Criminal Procedure Code. When the appeal came on for hearing Mr. Jai Gopal Sethi who appeared on behalf of the appellants raised a preliminary objection to the effect that the provisions of Section 342, Criminal Procedure Code, had not been complied with by the learned Sessions Judge inasmuch as the accused persons had not been properly examined by him and all the circumstances upon which the conviction was based were not put to the accused persons and they were not asked to give an explanation of these circumstances. Mr. Sethi relying upon a recent decision of the Supreme Court in 'TARA SINGH v. THE STATE', (Criminal Appeal No. 14 of 19511 contended that the trial had been vitiated by the failure of the Sessions Judge to observe the provisions of Section 342, Criminal Procedure Code, and the case should therefore be remanded for a fresh trial. A question arose whether the accused persons should not be sent for in the High Court and examined so that if they had any explanation of the circumstances proved against them they should be able to state their explanation and then this Court could determine what further steps in the matter were necessary. The contention of Mr. Sethi was that the accused persons couldnot be sent for in this Court because the irregularity committed by the learned Sessions Judge had vitiated the trial and this defect could not be cured by the appellate Court summoning the accused persons and examining them. The Division Bench consisting of my brothers Bhandari and Soni then decided to refer the question stated above to a larger Bench. The matter had assumed importance in view of certain remarks made by Bose, J., of the Supreme Court and it was anticipated that a similar objection would be raised in a number of other cases.

14. The point for decision therefore is whether the High Court has the power to call an accused person and examine him at the time of hearing his appeal. The question broadly stated in this manner can admit of only one answer, namely, that the High Court has every power to summon an accused person and examine him, but the contention of Mr. Sethi is that where the object of a summoning an accused person is to cure an irregularity of procedure the High Court has no such power more particularly when the irregularity is of such a type as renders the trial invalid, for that would mean that the High Court is curing an incurable irregularity. The powers of the High Court would therefore have to he considered in relation to an irregularity committed by the trial Court more particularly an irregularity which takes the shape of a breach of the mandatory direction contained in Section 342, Criminal Procedure Code.

15. The general powers of appellate Courts in the matter of appeals are set out in Section 423 of the Code of Criminal Procedure. This section contemplates that the appellate Court at the time of hearing this appeal can hear the appellant or his Pleader and when the appeal is filed by the State under Section 417, Criminal Procedure Code, the accused person can also be heard. The power given to the appellate Court is a very wide one and does not restrict its functions to examining the record only. Indeed, additional evidence can be summoned by the appellate Court under Section 428, Criminal Procedure Code. Our attention was also drawn to Section 540, Criminal Procedure Code, which enables any Court at any stage of any inquiry, trial or proceeding to summon any person as a witness or examine any person in attendance though not summoned as a witness. The Court may also re-call and re-examine any person already examined. This section applies not only to trial Courts but also to appellate Courts, for the words used are 'any Court' and 'trial or other proceeding under this Code'. A reference may also be made to the powers of appellate Courts in England. Section 9 of the Criminal Appeal Act, 1907, authorises the Court of Criminal Appeal to call for fresh evidence, order the production of document or exhibit, summon witnesses and to do various other acts which may be necessary to do justice in the matter. The power given to the Court of Criminal Appeal in England is even wider than the power given to the appellate Courts in India under the Code of Criminal Procedure even though trials in England are held with the aid of a jury. The object of the Legislature in giving these

powers is not to constrict the functions of the appellate Court or to fetter their discretion but to attain the ends of justice and if in order to do this freshevidence is necessary the appellate Court has been given full authority to call such evidence. There is no bar against an appellate Court calling an accused person and hearing him. Indeed, if witnesses who give evidence against the accused person can be heard it follows 'a fortiori' that an accused person can be heard In his own defence, and in view of these provisions (Sections 423, 428 and 540, Criminal Procedure Code) it may seem somewhat astonishing to suggest that the High Court cannot call the appellant and hear what he may have to say in his defence. The point raised by Mr. Sethi however is that it is not so much calling an accused person and hearing him (which the High Court can undoubtedly do) but of determining whether the trial by the original Court at any rate when the object of so doingand if that happens the only course open to the appellate Court is to order a fresh trial. Hence it is clear that an accused person may be summoned and examined by the appellateCourt at any rate when the object of so doing is not to cure an irregularity of -procedure which has vitiated the trial. The sole question which remains to be answered is whether this procedure can be followed in order to cure an irregularity or illegality in the trial.

16. Mr. Sethi has drawn our attention to certain remarks in the judgment of the Supreme Court in 'TARA SINGH v. THE STATE', (Criminal Appeal No. 14 of 1951). I have made a careful study of this judgment and I find that two conclusions emerge therefrom. In the first place, their Lordships have laid down quite clearly that the provisions of Section 342, Criminal Procedure Code, in examining anaccused person should be fairly and faithfully observed and it is not sufficient compliance with the provisions of law to put a general question regarding the allegations of the prosecution without setting out the various circumstances which have been proved or established by the prosecution. In the case of a Sessions trial jt js not sufficient to put to the accused person the statement which he made at the preliminary inquiry. The Sessions Judge must put to the accuse'd various facts and circumstances which add up to his guilt.

17. In the second place, it is Quite clear that every error or omission in the examination of the accused would not necessarily vitiate the trial. This is what

Bose, J., observed :

'I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fall within the category of cur-able irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of Section 342, Criminal Procedure Code, is so gross in this case that I feel there is grave likelihood of prejudice.'

18. Therefore it will depend upon the facts of any particular case whether the failure of the Sessions Judge to examine the accused person properly docs or does not amount to an incurable irregularity, and this point can only bo determined by considering the facts of that particular case.

19. Let us first take the case in which the error is nothing more than a curable irregula-rity, and the first question that arises is how can the appellate Court determine that it is only a curable irregularity. Mr. Sethi argues that the Court should determine this point solely on the evidence on the record itself. On the other hand, it is contended by the learned Advocate General that the Court has the power to call the accused person before it and then determine this point. Mr. Sikri's contention is that the appellate Court has always the power to call an accused person and hear what he has to say in his defence. If in any particular case the Sessions Judge has not properly examined him and has not put to him all the facts and circumstances which require an explanation, the appellate Court should summon the accused person and put these matters to him. If the explanation fur-nished by the accused person is no explanation at all the Court (the High Court or the appellate Court), may well come to the conclusion that the error was nothing more than a curable irregularity, for the accused had no explanation to give or his explanation was so unsatisfactory that it could be totally disregarded and the trial Court would not have come to any conclusion except the one at which it arrived. If, on the other hand, the accused has some plausible explanation to give or wishes to produce evidence in support of his explanation, the appellate Court or the High Court may come to the conclusion that this explanation should have been given at

the trial, for had it been so given the trial Court might well have come to a different conclusion. In such a case the error or omission will not fall within he category of curable irregularities and the failure of the Sessions Judge to comply with the provisions of Section 342, Criminal Procedure Code, will vitiate the trial. It appears to me that there is considerable force in Mr. Sikri's contention and this is the only sound and proper way of looking at the matter.

20. Mr. Sethi cited a number of rulings in which it was held that failure to comply with the provisions of Section 256, Criminal Procedure Code, vitiates the proceedings and in such cases the only course open to the appellate Court is to order a re-trial. He also cited a number of cases in which it was held that where the accused person was not examined after the close of the prosecution evidence as required by law the trial was vitiated. In particular he relied upon 'PROMOTHA NATH v. KING EMPEROR', 50 Cal 518, 'DIBA-KANTA CHATTERJEE v. GOUR GOPAL MUKHERJEE', 50 Cal 939, 'SURENDRA LAL SHAHA v. ISAMUDDI', 51 Cal 933, 'EMPEROR v. KONDIBA BALAJI', AIR 1940 Bom 314, 'NANA v. EMPEROR', AIR 1938 Nag 283, 'ABDUS SAMAD MOHAMED v. EMPEROR', AIR 3925 Cal 172, 'KUNDAN LAL v. EMPEROR', AIR 1934 Lah 648 (1) and 'ANAND PAR-KASH v. EMPEROR', AIR 1934 Lah 631. There is, however, ample authority for the view that the failure to examine the accused person does not in every case vitiate the trial. A Division Bench of the Bombay High Court in 'EMPEROR v. KONDIBA BALAJI', AIR 1940 Bom 314 held that every failure to comply with Section 342, Criminal Procedure Code, does not necessarily vitiate the trial. There are many other reported cases but the point has been authoritatively decided by their Lordships ofthe Supreme Court in 'TARA SINGH v. THE STATE', (Cri Appeal No. 14 of 1951). The Privy Council held in TULUKURI KOTTAYA v. EMPEROR', AIR 1947 P C 67 that even a breach of the provisions of Section 162, Criminal Procedure Code, amounts to a curable irregularity when the Court comes to the conclusion that as a matter of fact no prejudice was caused and no failure of justice has resulted. So it must first be determined whether any prejudice has been caused and whether a failure of justice has resulted. In order to determine whether prejudice has been caused the appellate Court may peruse the record, call the accused person and hear what he has to say in his defence. After doing this the Court may come to one of two conclusions. It may take the view that prejudice has

been caused and in that case a fresh trial will have to be ordered, or it may come to the conclusion that no prejudice has been caused and in that ease the error or omission of the trial Court would not amount to anything more than a curable irregularity. I cannot accept the contention of Mr. Sethi that the accused person cannot be summoned by the appellate Court for purposes of determining whether prejudice has or has not in fact been caused. Mr. Sethi says that this would be curing an irregularity. Calling the accused person and examining him, however, does not cure the irregularity but merely helps to determine whether the irregularity is of such a serious type as to be incurable or whether it is of a type which can be ignored under the provisions of Section 537, Criminal Procedure Code. Our attention was also drawn to Section 165 of the Indian Evidence Act, which empowers a Court to Question a party which includes an accused person, in order to discover or obtain proper proof of relevant facts. If any facts are revealed they will have to be proved in the ordinary way. This means that if the convict has any explanation to offer, a fresh trial will have to be ordered. If on the other hand the only information gleaned from the examination of the accused is that he has nothing to say and would have had nothing to say had he been examined at the trial, then the appellate Court will come to the conclusion that the accused person was not prejudiced in any way and the non-compliance with Section 342, Criminal Procedure Code, did not occasion any failure of justice.

21. There may be cases in which the appellate Court will not feel the need to summon the accused person, for upon a perusal of the record it will be sufficiently obvious that the accused person has been prejudiced, and in such cases a re-trial will at once be ordered. On the other hand, there may be cases in which the appellate Court feels the need to call the accused person and decide this question after hearing him, and in these cases a fresh trial may or may not be ordered, according to the explanation given by the accused person. Again, there may be cases in which the Court feels that prejudice has been occasioned but no useful purpose will be served in ordering a fresh trial. These are cases in which the appellate Court will acquit the accused person instead of ordering a fresh trial.

22. There is only one other matter which Reserves mention. The question proposed to the Bench referred to Section 375 of the Criminal Pro-cedure Code.

This section deals with the powers of the High Court sitting as a Court of Reference. Ordinarily when the case of a person sentenced to death is referred to the High Court under Section 374, Criminal Procedure Code, the High Court hears the reference after disposing of the appeal, and Section 375, Criminal Procedure Code is not intended to apply to the High Court sitting as a Court of Appeal. Therefore it is clear that the accused person may be summoned under Section 375, Criminal Procedure Code, but not for the purposes of deciding the appeal or determining whether any prejudice has been caused to the accused person on account of non-compliance with the provisions of Section 342, Criminal Procedure Code.

23. I may now briefly sum up my conclusions. My answer to the question proposed is that it is within the powers of the High Court to examine and further examine the convicts and that the law does not place any restrictions upon this power. But if the High Court is of the opinion whether before or after examining the convicts that non-compliance with the provisions of Section 342, Criminal Procedure Code, has occasioned or is likely to have occasioned prejudice to the convicts the High Court will order a fresh trial. If, on the other hand, it comes to the conclusion that no such prejudice was caused and no failure of justice was occasioned the appeal will be heard and decided upon merits. With regard to the order of remand this may contain a direction that the trial will proceed from the point where the irregularity occurred or a totally fresh trial may be ordered depending on the facts of that particular case. For instance, if the trial Judge has been transferred a 'de novo' trial will be ordered. On the other hand in some cases the same Sessions Judge may be asked to re-examine the accused and to dispose of the case without holding a completely new trial.

Bhandari, J.

24. I agree.

Soni, J.

25. I agree.

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