

Munni Begum Vs. State

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Court : Delhi

Decided On : Apr-15-1968

Reported in : AIR1968Delhi202; 1968CriLJ1162; 5(1969)DLT194

Judge : Hardayal Hardy, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 205, 205(2), 342, 540A and 540A(1)

Appeal No. : Criminal Revn. No. 41 of 1968, against order of Magistrate, First Class, Delhi, D/- 13-6-1967

Appellant : Munni Begum

Respondent : State

Advocate for Pet/Ap. : Sultan Yar Khan, Adv; R.N. Tikku, Adv

Judgement :

ORDER

(1) The facts in this Criminal Revision which has been referred to this Court by the Addl. Sessions Judge, Delhi, are that Mst. Munni Begum, who will hereafter be referred to as the petitioner, is the widow of Pir Wazir Ali Shah Warsi. He died in Delhi on 15-4-1967 and was buried by the petitioner in a room of her house No. 773, Phatak Karoli, Frash Khana, Delhi. Inasmuch as the said house had not been set apart for making graves for burial of dead persons, she was called upon to

remove the nuisance by service of notice under Section 398 of the Delhi Municipal Corporation Act, 1957, but she failed to do so. A complaint was thereafter lodged against her by the Delhi Municipal Corporation for offences under Section 397(1)(d), 398 and 461 of the Delhi Municipal Corporation Act, 1957, in the Court of a Magistrate who issued summons for the appearance of the petitioner.

Before she appeared in Court an application was moved on her behalf under Section 205 of the Code of Criminal Procedure through her advocate Mr. Sultan Yar Khan wherein it was stated that she was a pardahnashin lady and widow of a renowned religious leader and that her personal attendance may, therefore, be dispensed with and she may be allowed to appear through her pleader. The request was granted by the learned Magistrate Miss Vimla Bhagat by her order dated 2-6-1967. The offences alleged against the petitioner being petty offences, inasmuch as the maximum sentence that can be imposed on the petitioner is a fine of Rs. 50 only, the case is obviously triable as a summons case. In response to the notice under Section 242, Criminal P. C., Mr. Sultan Yar Khan made a statement on behalf of the petitioner saying that she was not guilty. Learned Magistrate thereupon recorded statements of prosecution witnesses and passed an order directing the petitioner to appear in person for making a statement under Section 342, Criminal Procedure Code.

(2) Dissatisfied with the order made by the learned Magistrate requiring the personal attendance of the petitioner a revision was filed by her in the Court of Session which, as stated above, has resulted in this reference by the learned Addl. Sessions Judge Mr. O. N. Vohra with a recommendation that the order passed by the learned Magistrate be set aside and the personal appearance of the petitioner be dispensed with until the time the final order is made in the case and that she be not compelled to appear in person unless it is found necessary to execute the sentence of fine, in case such sentence is imposed on her and the petitioner is to be directed to be sent to jail in default of payment of fine.

(3) Several authorities have been cited by the learned Addl. Sessions Judge in support of the recommendation made by him including a passage from a judgment of Rajasthan High Court in Begum Eejun v. The State. Air 1955 Raj 175, which

read as:

'Thus, a review of the above cases makes it quite clear that S. 342 is subject to the provisions of S. 205, Criminal P. C., that the appearance of a pleader under S. 205, Cr. P. C., involves the performance of all acts which devolve upon the accused in the course of the trial and, therefore, he can be examined under S. 342, Cr. P. C., by the Courts, in place of the accused for whom he appears. Section 366, Cr., P. C., further makes it clear that the personal attendance of the accused during the trial may be dispensed with by the Court even till the delivery of judgment and his conviction if the sentence is one of fine only. I do not, therefore, agree with the contention raised by the learned Government Advocate that a pleader of an accused cannot be examined under Section 342 in a case where personal attendance of the accused is dispensed with under S. 205, Cr. P. C.'

(4) Learned Addl. Sessions Judge has also remarked that no authority to the contrary had been cited on behalf of the State nor had the learned Public Prosecutor made any endeavor to defend the action taken by the Magistrate. But for this observation of the learned Addl. Sessions Judge, I would not have considered it necessary to make a detailed order in this case for the simple reason that on the facts of the case I have not the least hesitation in agreeing with the learned Addl. Sessions Judge and the recommendation made by him. I, however, cannot allow this to go on record that there are no decided cases taking a view contrary to that taken by the learned Addl. Sessions Judge and in the judgments of the High Courts of Bombay, Calcutta and Rajasthan in *Emperor v. Jaffar Cassum Moosa*, Air 1934 Bom 212; *Anila Bala Devi v. Chairman, Prova Debi v. Mrs. Fernandes*, : AIR1962 Cal203 ; and Air 1955 Raj 175 cited by the learned Judge.

(5) The first and the foremost judgment in which a contrary view has been taken is a judgment of the Punjab High Court in *Sadhu Ram v. Mst. Amar Kaur*, where D. Falshaw, J. (as he then was), not only declined to follow the view of Bombay High Court in Air 1934 Bom 212, but also the view of four other High Courts, namely, Madras, Calcutta, Orissa, and Madhya Pradesh. A contrary view has also been taken by the High Court of Allahabad in *Ishwardas v. Bhagwan das*, : AIR1934

All693 . Although in a recent case, Ram Singh v. State. : AIR1959 All623 , Desai, J., has taken a view which is in consonance with the views of Bombay, Madras, Orissa, and other High Courts. Even in Calcutta High Court there has been a sharp divergence of opinion among the Judges of that Court. In Adeluddin v. Emperor : AIR1945 Cal482 , Lodge and Sen, JJ., took the view that Section 342 is not subject to the Provisions of Section 540A, Cr.P.C., which in a way is analogous to section 205. Criminal procedure Code. A contrary view was, however, taken by a Division Bench consisting of Chander and Guha, JJ., in Smt. Champa Devi v. Babulal Goenka, : AIR1950 Cal161 .

(6) The conflict between these two Bench decisions of the same Court was attempted to be resolved by a reference to a Full Bench in 1954 for a straight answer to the question as to which of the two cases had been correctly decided. The question was, however, left undecided by the Full Bench because on the facts of that case it could not be said that the accused was properly represented by a pleader. The controversy was raked up once again in Dudhnath Shaw v. The State, : AIR1958 Cal431 , Where J. P. Mitter and Debabrata Mookerji, JJ., took the same view as had been taken by Lodge and Sen, JJ, in : AIR1945 Cal482 in Preference to the view of Chunder and Guha, JJ, in : AIR1950 Cal161 .

(7) In 1962 the question of correctness of all these decisions was referred to a Full Bench of five Judges in : AIR1962 Cal203 . By a majority of 3:2 it was held that where a Magistrate has permitted the accused to be represented by a pleader under S. 205 (1) or S. 540A (1), Cr.P.C., he was not bound to compel the appearance of the accused for examination under Section 342 and that he might exercise his discretion in the matter and examine the pleader of the accused on his behalf. The Bench decisions in the cases of : AIR1945 Cal482 and : AIR1958 Cal431 were expressly overruled.

(8) All the five Judges wrote separate judgments containing an exhaustive review of the entire case-law on the subject. As I am in respectful agreement with the majority view in that case, it is not necessary to cover the same ground over again. Suffice it to say that there is a uniform current of authority in practically all the High Courts except Allahabad and Punjab as mentioned above in favor of the view

taken by the majority of Judges on the Calcutta case.

(9) In one of the earliest cases decided by the Court of Judicial Commissioner of Sind in 1912: *Emperor v. Jamal Khatun*, (1913) 14 Cri Lj 272, it was held that S. 205 of the Code allows the accused to appear by pleader, and such appearance involves the performance of all acts which devolve upon the accused in the course of trial, such as answering the examination by the Court under S. 342 or pleading or refusing to plead to the charge under Section 255 of the Code. The same view was taken by Rangoon High Court in *Maung Po Nyein v. Haka Singh*, Air 1927 Rang 73.

(10) *Jamal Khatun's case*, (1913) 14 Cri Lj 272, decided by the Judicial Commissioner of Sind was followed by the High Court of Bombay in *Doradshah Bomanji v. Emperor* : AIR1926 Bom218 , Which in turn was approved by Beaumont, C. J, in *Jaffar Cassum Moosa's case*, Air 1934 Bom 212. The same view was adopted by Madras High Court in the decision *In re C. M. Raghavan*, : AIR1950 Mad814 , where it was held that it is for the Magistrate to consider whether it is necessary to direct the personal attendance of the accused who was exempted under Section 205 for examination under Section 342 of the Code and that the omission to examine the accused personally does not vitiate the trial.

(11) *Panigrahi, C. J.* of the Orissa High Court took the same view in *Rusiu Biswal v. Nakhyatra Malini Devi*, : AIR1954 Ori65 holding that it is not obligatory on the Magistrate to require the personal attendance of the accused whose presence had been dispensed with under Section 205 at any stage including examination under Section 342, and if the Magistrate is satisfied that the examination of Muktear on behalf of the accused is sufficient, the non-examination of the accused personally will not render the trial illegal.

(12) In *State v. Tarachand Anand*, : AIR 1957 MP219 , *Nevsakar, J.*, pointedly referred to the decisions of those High Courts including the decision of the Allahabad High Court in : AIR1934 All693 in which a contrary view had been taken and held that the view taken therein about the necessity of the accused being called to personally attend the Court for examination under Section 342 does not appear to be correct as it proceeds upon the wording of Section 342 alone and

does not take into account the provisions regarding exemption and also the provisions of Section 366 (2) of the Code.

(13) The Kerala High Court in *Karanjia v. Chellappan Pillai*, : AIR1960 Ker383 , after noticing the decisions of various High Courts on the point, including the decision of *Falshaw, J.* of the Punjab High Court and the bench decision of Calcutta High Court in *Dudhnath Shaw's case*, : AIR1958 Cal431 , came to the conclusion that when the accused is exempted from personal appearance under Section 205 (1) of the Code, it is not obligatory on the part of the Magistrate to enforce the personal attendance of the accused for the purpose of examination under Section 342; and that it is for the Magistrate to consider in each particular case whether it is necessary to do so; the view that Section 342 makes it obligatory to examine the accused personally was considered and rejected.

(14) It would thus be seen that although the weight of authority is almost entirely in favor of the view taken by the learned Addl. Sessions Judge in this case, the opposite view also has its advocates.

(15) An examination of the decided cases, however, shows that the question has generally arisen on a grievance made by the accused, after he had been convicted, that he had not been personally questioned by the Magistrate after he had been exempted from personal appearance either under Section 205 (1) or Section 540A (1) of the Code. *Falshaw, J.*, is, therefore, right in saying that one cannot help feeling that in some of the early cases at least which had been followed in the others, the views of the learned Judges were somewhat influenced by the point of view from which they were considering the matter. Learned Judge was, however, prepared to hold that where an accused person claims and is granted the privileges of not having appeared at the trial in person and in this manner escapes personal examination under Section 342, the appellate or revisional Court will naturally be very reluctant to allow him to take advantage of this fact for the purpose of setting aside his conviction.

The later decisions, however, do not appear to me to be based on this approach to the question alone. The approach in those cases, especially the majority decision in : AIR1962 Cal203 , proceeds rather on the construction of the various provisions

of the Code itself. Take the case like the one with which we are concerned now. It is a summons case where, according to the procedure prescribed by section 242 of the Code, the pleader appearing for the accused was asked if she had any cause to show. The pleader denied the accusation. If he had admitted the same conviction would have followed, subject to the provisions of Section 366 (2) which provides that if the Magistrate proposes to pass a sentence of imprisonment, the accused must be required to attend in person to hear the judgment delivered even if the accused were permitted to appear by pleader; but if the sentence is to be one of fine or if there is acquittal, the pleader may represent the accused even for hearing the judgment. There is no express provision in any of the sections dealing with trial of summons cases indicating that personal appearance of the accused is necessary either to hear the accusation or to show cause and plead for if there were any such provision there was no point in dispensing with his personal attendance under Section 205 (1) or Sec, 540A (1) of the Code.

(16) Take then the case which is triable as a warrant case. Under Section 251-A which applies to a case instituted on a police report, the accused either appears in Court or is brought before a Magistrate at the commencement of the trial. When the accused appears before the Court or is brought before it, a request for his exemption from personal attendance is made on his behalf under Section 540A (1) and the Magistrate, if satisfied that the personal attendance of the accused is not necessary in the interest of justice and the accused is represented by a pleader, dispenses with this attendance and decides to proceed with the inquiry or trial in his absence. Thereafter upon consideration of all the documents referred to in Section 173 and making such examination of the accused as he considers necessary, the Magistrate frames in writing a charge against the accused. Sub-section (4) requires that the charge shall then be read and explained to the accused and he shall be asked whether he is guilty or claims to be tried.

(17) In the very nature of things, if the personal attendance of the accused has already been dispensed with, the answer to the charge will have to be made by his pleader. If the plea is one of guilty, the Magistrate shall, under sub-section (5), record the plea and may, in his discretion, convict him thereon. This will attract the application of Section 366 (2). But if on the other hand the pleader on behalf of the

accused either refuses to plead or does not plead or claims to be tried, the Magistrate shall, under sub-section (6), fix a date for the examination of the witnesses and so on and so forth till the evidence on behalf of the prosecution as well as defense is recorded and concluded and the case reaches the stage of final judgment. That will again attract the provisions of Section 366 (2).

(18) The procedure in a warrant case instituted otherwise than on a police report is slightly different, but in broad essentials it is generally the same except that in such a case a substantial portion of the prosecution evidence has to be recorded before the stage of charge under Section 254 and the plea of the accused to the charge is reached under Section 255 of the Code. It is, however, clear that in this case also if the accused pursuant to an exemption granted to him under Section 205, it is the pleader who will hear the charge read and explained and will be called upon to plead, and the accused may be convicted and sentenced if his pleader pleads guilty, subject again to the provisions of Section 366 (2) of the Code. There is again no express provision in Section 255 requiring the personal presence of the accused at this stage, and, therefore, the pleader may fully represent the accused for the purpose of Section 255 of the Code.

(19) It follows, therefore, that the appearance of the accused by pleader involves the performance of all acts that devolve upon the accused in the course of the trial. There is nothing in the language of Section 342 which excludes from the category of acts that the pleader is required to perform that makes the personal examination of the accused mandatory. It is, however, altogether a different matter if in the circumstances of a particular case the Magistrate considers that the personal examination of the accused is necessary. Section 205 (2) expressly confers such a power on the Magistrate and so does Section 540A. But if on the facts of a particular case the Magistrate does not consider a personal examination of the accused necessary, there appears to be no cogent reason why the Magistrate should be precluded from exercising his discretion in favor of permitting examination under Section 342 by pleader.

(20) It may be considered necessary by a Magistrate at some stage of the inquiry or the trial that the accused should be personally present before him because his

presence is required for the purpose of identification by some of the prosecution or defense witnesses. His personal appearance may also be required because the pleader representing him is not able to answer a particular question that the Magistrate wants to put to the accused under Section 342 of the Code. Instances of such nature may be easily multiplied. For those a provision already exists in Section 205 and 540A. But so say that there is anything express or implied in Section 342 itself which makes it obligatory on the Magistrate to require the personal appearance of the accused before him does not appear to me to be warranted having regard to the scheme of trial of summons as well as warrant cases prescribed by the Code.

(21) Besides the reasoning of the learned Judges of the Calcutta High Court in *Dudhnath Shaw's case*, : AIR1958 Cal431 , *Falshaw, J.*, was also greatly impressed by the fact that Section 342 , apart from giving the Court the power to put any question at any time to the accused, imposes on it a duty to question the accused fully at the close of the prosecution case, and if this had not been intended to apply in the case of an accused whose personal attendance had not been dispensed with either under Section 205 or Section 540-A, it is hard to see why the exception was not specifically embodied in the Section by way of a proviso.

(22) The argument, in any opinion, does not carry the case, for the mandatory character of the provision in Section 342 requiring the personal attendance of the accused for examination, any further and may be answered back by a counter-argument that if that was the view of Section 342, why it was not considered necessary to add a similar proviso to Section 242, Section 243 and Secs. 251A (4) and (6) and 254 and 255 that while all those acts should be performed by the pleader on behalf of the accused, the examination of the accused must be held in the presence of the accused.

(23) The strongest argument in favor of the personal attendance of the accused under Section 342 is to be found in the observations of Rankin, J. (as his Lordship then was) in *Prompto Nath v. Emperor*, Air 1923 Cal 470, where his Lordship was dealing with the necessity of complying with the requirement regarding oral

examination of the accused prisoner under Section 342 Cr. P. C. His Lordship observed:

'In this country it often happens that a prisoner is tried in a language which for one reason or another he understands but indifferently well and for that reason as well as for other equally grave reasons, the intention of the statute is that at a certain stage in the case, the Court itself shall put aside all counsel, all pleaders, all witnesses, all representatives, and shall call upon an individual accused with the authority of the Court's own voice to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating. In the case of an accused who is in no difficulty in understanding proceedings a question addressed to his counsel in his hearing may perhaps be taken in certain circumstances as a compliance with the section. It is not a full compliance with the section, but I say nothing whatever to create any more trouble than is absolutely necessary in any case of that character. What is necessary is that the accused shall be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defense if he is willing to make one with his own lips.....'. 'There is all the difference in the world between a written statement presumably prepared, almost certainly revised, by the lawyers appearing for the defense and a statement made by the accused himself, so that the Magistrate can observe his demeanour and his manner while he makes it and come to his conclusions as to the value of his evidence.'

(24) These are weighty words indeed and instead of their effect having been worn out by the passage of time, they have acquired a fresh dimension and an added importance. The question however still remains whether the necessity of requiring the personal attendance of the accused for oral examination under Section 342 is sine qua non of a valid trial for petty offences triable as summons-cases.

(25) It cannot be disputed that the present tendency of the legislature is to permit the accused to be represented by a pleader for all purposes, particularly in petty cases, and not to compel him to come to Court personally in all cases. Cases under the Motor Vehicles Act and under some of the Municipal statutes may be

mentioned as instances in point.

(26) Even in England where the ordinary rule is that no trial can be held except in the presence of the prisoner the requirement of personal attendance is confined to a trial for felony only where the accused is made to stand in the dock to be tried. A charge of misdemeanour may however be tried. A charge of misdemeanour may however be tried in the absence of the accused, if he has previously pleaded (8 Rep. Crim. L 143; R. v. Brown, (1906) 70 J. P. 472 and it is not necessary for him to be in the dock (R. v. Lovett, (1839) 9 C & P 462, though in practice he always is.

(27) In Dorabshah Bomanji's case : AIR1926 Bom218 , reference was made by the learned Judge to an English decision: R. v. Thompson, 19090 2 KB 614, and the corresponding provisions of the summary Jurisdiction Act under which that case was tried and it was pointed out that the provisions of law were similar to those contained in Section 242 and 243 of the Code and it was held that the accused might be permitted to appear by counsel and plead through the mouth of the counsel.

(28) The result of the foregoing discussion is that it is entirely a matter for Magistrate's discretion whether in a particular case he considers it necessary that the accused should personally appear before him for his examination under Section 342, but there is nothing in law that obliges him to do so.

(29) Mr. V. D. Misra, learned Addl. Standing counsel for the State therefore submitted that in the instant case the Magistrate having exercised her discretion, this Court should not interfere with the order made by her. It is not possible for me to accept the submission made by the learned counsel. Firstly, the learned magistrate has ordered the personal attendance of the accused not because in her view it was necessary to do so, by reason of the special circumstances of the case, but because she was of the view that the statement of the accused under Section 342 could not be recorded unless the accused was personally present before her. This, as I have already stated, is in my opinion an erroneous view of law. Secondly, the accused in this case is a purdahnashin lady and widow of a well renowned Muslim divine. The offence with which she is charged is a petty offence punishable with a fine of Rs. 50 only. As was held by the learned Judges

of Calcutta High Court in Anila Bala Devi v. The Chairman, Kandi Municipality : AIR1950 Cal350 , it is not proper for a magistrate to insist upon dragging a respectable lady to the Court for a petty offence.

(30) Before closing I might mention that some of the High Courts have gone to the length of holding that the mandatory provisions of Section 342 Cr. P. C. which require the Court to question the accused generally on the case after the examination of the prosecution witnesses, do not apply to trials in summons cases (see Ponuswami Odayar v. Ramaswami Thathan, Air 1924 Mad 15, Emperor v. Naga La Gyi, Air 1931 Rang 244, and K. Vidyanand v. Eramma, Air 1962 AP 394, although a contrary view has been taken by the High Courts of Allahbad, Bombay and Calcutta in Sia am v. Emperor : AIR1935 All217 , Gulabjap v. Emperor, Air 1922 Bom 290 and Bechu Lal Kayastha v. Injured Lady : AIR1927 Cal250 .

(31) It is however not necessary to express any opinion on that point as I have already held that it is not at all obligatory on the magistrate to require the personal attendance of an accused to whom exemption from personal appearance has already been granted, for his examination under S. 342 Cr. P. C. and it is indeed a sound exercise of discretion in all summons cases, except in some very special cases alluded to by me, that such appearance should not be insisted upon by the Court.

(32) The reference made by the learned Addl. Sessions Judge is therefore accepted, the order of the learned magistrate directing the personal attendance of the petitioner is set aside and the learned magistrate is directed to dispense with the appearance of the petitioner at all future stages of the trial including the stage of pronouncement of judgment unless it becomes necessary to send her to jail in default of payment of fine which the Court may impose on her in the event of her being convicted of the offence for which she is being tried.

(33) Reference allowed.