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Court : Rajasthan

Decided On : Aug-23-1951

Reported in : AIR1954Raj41

Judge : Wanchoo, C.J. and; Bapna, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 342 and 537

Appeal No. : Criminal Appeal No. 1 of 1950

Appellant : The State

Respondent : Kayam and anr.

Advocate for Def. : Chand Mal, Adv.

Advocate for Pet/Ap. : Sumer Dan, Adv.

Disposition : Appeal dismissed

Judgement :

Wanchoo, C.J.

1. This is an appeal by the State against the order of Shri Abdul Zalil Kazi, First Class Magistrate, Bhinmal, acquitting Kayam and Hakiya, opposite parties of an offence under Section 326, Penal Code.

2. The prosecution story was briefly this. Jiwan was working at a well in village Sedwa. The two opposite parties, Kayam and Hakiya, and a third person Abdulla, came together to the well, and Abdulla asked Jiwan to stop taking water from the well. Thereafter, Kayam caught hold of the hair of Jiwan's head, and Hakiya hit Jiwan with an axe. Abdulla also hit him with a lathi. A report of this Incident was made at Thana Sedwa within half an hour. The opposite parties pleaded not guilty. Hakiya's story was that he was working at the well, when Yusuf and Jiwan came, and abused him and hit him with lathies. Then people intervened, and saved him. He denied, however, that he had hit Jiwan with an axe. Kayam also denied having taken part in the incident. His statement was that he belonged to the party of Ashraf and Jiwan and Yusuf belonged to the party of Mohammad Rahim, and he had, therefore, been falsely implicated.

3. The case came before a number of Magistrates. A part of the prosecution evidence was recorded by one Magistrate. The evidence of one prosecution witness was recorded by another magistrate. Then a third Magistrate recorded the evidence of one more prosecution witness, and four defence witnesses, while the judgment was given by a fourth Magistrate. On account of this change in the Magistrates, the statements of the accused person were not recorded at the stage at which they should have been recorded under Section 342, Criminal P. C., after all the prosecution evidence was over. When the last Magistrate took over the case, this defect was noticed. He, therefore, recorded the statement of the accused after the defence evidence was over. Thereafter, he gave this judgment of acquittal.

4. It has been contended on behalf of the State that as the mandatory provisions of Section 342 were not followed, the trial was vitiated, and this Court should remand the case for re-trial. Reliance, in this connection, has been placed on the case of -- 'Feroze Kazi v. Emperor', AIR 1940 Pat 295 (A). In that case accused persons were examined after the arguments in the case were over. It was held that to examine the accused at such a late stage of the proceedings was worse than useless, and the procedure was illegal and vitiated the whole trial. Reliance was placed on an earlier Patna case, viz., -- 'Ram Charan Singh v. Emperor', AIR 1926 Pat 29 (1) (B) and a Calcutta case, -- 'Surendra Lal v. Isamaddi', AIR 1925

Cal 480 (1) (C).

5. These cases certainly support the contention put forward on behalf of the State; but all the High Courts are not agreed on the question whether, where there is such a defect, the trial is entirely vitiated, or whether it is a mere irregularity, which is curable under Section 537, Criminal P. C., provided no prejudice has been caused to the accused persons. We may, in this connection, refer to the case of -- 'N. A. Subramania Iyer v. Emperor', 28 Ind App 257 (PC) (D), where it was held by their Lordships of the Privy Council that a contravention of Section 234 (1). Criminal P. C. was illegality, which vitiated the whole trial. In that case Subramania Iyer had been charged with as many as 41 offences of the same kind. In a later case namely, -- 'Abdul Rehman v. Emperor', AIR 1927 PC 44 (E), however, their Lordships of the Privy Council explained their decision in -- 'Subramania Iyer v. Emperor (D)', in these words at page 48:

'There have been a number of decisions in India upon these enabling or curing sections, but the only important one which came before this Board is the case of -- 'Subramania Iyer v. Emperor', (D). There the trial of a man charged of extortion in which 41 criminal acts extending over a period of two years were brought against him in contravention of a section of the Code which provides that a man can only be tried for three offences, and those committed within a period of 12 months, was held bad, and the conviction was quashed because the provisions of Section 537 of the then Cr. P. C. did not cure it.

The distinction between that case and the present is fairly obvious. The procedure adopted was one which the Code positively prohibited, and it was possible that it might have worked actual injustice to the accused.'

6. In -- 'Abdul Rehman's case (E)' the defect that was pointed was that the depositions of witnesses had not been read over to them, and thus no opportunity was given for correction, if any, by those witnesses. This is provided in Section 360, Criminal P. C. Their Lordship held that this was a mere irregularity, and it was not in itself a sufficient ground for quashing a conviction. At page 49, their Lordships remarked as follows:

'To sum up, in the view which their Lordships take of the several sections of the Code of Criminal Procedure, the bare fact of such an omission of irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which in their Lordships' view, may be supported by the curative provisions of Ss. 535 and 537.'

It is, therefore, clear that the omission to comply, with every provision in the Code of Criminal Procedure, which is mandatory in form, does not necessarily vitiate a trial, unless the provision positively prohibits a certain course of action, as is the case for example in Section 234 (1) read with Section 233 of the Code. In other cases, it seems to us that it will have to be considered in each case, whether the omission or irregularity was such as (sic) to prejudice the accused. Where prejudice has been caused to the accused, or may probably have been caused, the trial will be quashed; but where there has been no prejudice whatsoever to the accused because of the omission or irregularity, the trial will be held valid in view of the curative provisions of Ss. 535 and 537, Criminal P. C.

7. With these principles as the guiding principles in such cases, we now turn to examine the facts of the present case. There is no doubt that it was the duty of the Magistrate to examine the accused persons after the prosecution evidence was all over, and in so far as this was not done, the provisions of Section 342 of the Code were not complied with; but this is not a case where the accused were never examined at any stage of the trial altogether. It may be different matter altogether if the accused persons are never examined at all, for in such a case it may be possible to say that there would 'prima facie' be prejudice to the accused, inasmuch as their explanation was never taken at any stage of the case. But with due respect to the view taken by the learned Judges of the Patna High Court in -- 'Feroze Kazi's case (A)', we are of opinion that it would be going too far to say that where the irregularity or the omission has been tried to be repaired by the examination of the accused at a late stage, it must be held that the trial was vitiated, irrespective of the fact whether any prejudice was caused to the accused or not. It seems to us that where the omission was realized by the Court at a late stage of the case, and it tried to repair the mistake and took the statement of the

accused after the defence was over, it cannot be said that the trial was necessarily vitiated, because of the delay in examining the accused. In such a case, we are of opinion that it is the duty of the Court to consider whether there was any prejudice to the accused by this late examination. If there was any prejudice, the trial would be set aside; but if in the particular circumstances of a particular case the Court comes to the conclusion that there was no prejudice to the accused, the trial should stand in view if the provisions of Ss. 535 and 537, Criminal P. C.,

8. We may refer to certain cases in support of the view we are taking. In -- 'Emperor v. Kondiba Balaji', AIR 1940 Bom 314 (P)', that Court held that it could not be said that every failure to comply with Section 342 necessarily vitiated the trial. It was further held that if the Court was satisfied that failure to comply with the strict terms of the section had caused no prejudice, the Court should not interfere, as the provisions of Section 537 covered such a case.

9. In -- 'Hafiz Mohd. Rafiq Ahmad v. Emperor', AIR 1938 Ail 319 (G), it was held that even if it was strictly necessary under Section 343, Criminal P. C. to re-examine the accused after the witnesses for the prosecution had been cross-examined at the instance of the accused after the charge had been framed, still it only amounted to an irregularity which was cured, if no injustice was caused to the accused. Similar was the view taken in -- 'Bam Udit v. Jagannath', AIR 1942 Oudh 342 (H).

10. In a Full Bench case of the Rangoon High Court, -- 'Emperor v. U Damapala', AIR 1937 Rang 83 (I), it was held that the omission to ask an important question to enable the accused to give an explanation of any circumstances appearing in the evidence against him was an irregularity. In every case of this kind, the Court has to consider whether the omission in fact occasioned a failure of justice. Where such a failure of justice has been occasioned on account of the omission or irregularity, the trial will be set (sic) aside; but if after looking (sic) into the facts, the Court is of opinion that no such prejudice has been caused, the irregularity, which has occurred, will not save the accused from punishment.

11. In the case before us, we are of opinion that no prejudice whatsoever was caused to the accused by the fact that they were examined after the defence was

over. They had already given evidence in defence in support of the case that was put forward by them in their statements. The Magistrate even asked them if they wanted to produce further defence, and they said that they did not want to do so. It cannot, therefore, be said that there was any prejudice to them under the circumstances. We may, however, point out that the Magistrate had no business to say, as he has said in his judgment, that Section 342, Criminal P. C. has not been fully complied with, and, therefore, the accused were entitled to the benefit of that. The case was then before him as a trial Court, and if he thought that there was an irregularity, which might affect the merits of the case, it was his duty to re-start the trial from the stage where the statement of the accused had to be taken. It is most improper for Magistrates to commit irregularity themselves, and then to take advantage of those irregularities in the end for the purpose of acquitting accused person. However in this case, as we have already said, there was no prejudice to the accused, and the trial cannot, therefore, be held to be vitiated on that ground.

12-15. We now turn to the merits of the case. (After reviewing the evidence the judgment proceeded).

16. On a careful consideration, therefore, of the entire evidence in this case we are not satisfied that a case had been made out for conviction on the kind of evidence that now stands on the record. It may be that the evidence has been spoiled, as urged on behalf of the State; but if that is so, we cannot help it. The appeal is hereby dismissed.