

Chhagansingh Vs. the State

Chhagansingh Vs. the State

SooperKanoon Citation : sooperkanoon.com/753004

Court : Rajasthan

Decided On : Aug-26-1953

Reported in : AIR1954Raj153

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

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 211, 237, 284, 309, 326 and 537

Appeal No. : Criminal Appeal No. 51 of 1952

Appellant : Chhagansingh

Respondent : The State

Advocate for Def. : Kanwar Bahadur, Govt. Adv.

Advocate for Pet/Ap. : L.N. Chhangani, Adv.

Judgement :
ORDER

Modi, J.

1. This is an appeal by the accused Chhagan Singh who has been convicted of offences under Section 307, Penal Code, and Section 19, Arms Act. He has been sentenced to five years' rigorous imprisonment and a fine of Rs. 100/- and in

default to undergo further rigorous imprisonment for three months under Section 307, I. P. C., and to 18 months' rigorous imprisonment under Section 19, Arms Act.

2. The case for the prosecution is briefly as follows: On 27-2-52, Malusingh, Head Constable attached to the police station Ratannagar, came to know that the dacoits Mohania, Dhannesingh and Chhagansingh were in the village Raipuria and were expected to stay there during the night. It is said That these persons were wanted by the police in connection with several crimes. Malusingh went on the same night to the Superintendent of Police, Churu, Shri Tarachand (P. W. 1) who immediately on being informed organised a raid party to go to Raipuria. The police party led by the Superintendent of Police left for Raipuria in two Government cars, and kept guard on the village during the night, but they found in the morning that the dacoits had left Raipuria and were staying in the sand-hills in the neighbourhood of the village. The police party tracked them for about 20 to 25 miles and eventually saw them from a distance of about 250 to 300 yards in the jungle of Ratansar.

The accused and his companions seeing that they were being pursued by the police, jumped down from their camels, took cover under the boundary wall of a field and prepared themselves for an attack on the police. The police party took up their positions on the other side of the field. The accused's party started firing and the police also returned fire. It is said that Mohania fired three shots, and thereafter ran away having handed over his rifle to Dhannesingh, that Dhannesingh also fired two shots and thereafter he passed on the rifle to Chhagansingh and was running away. It is further said that Chhagansingh had just fired one shot when the police party managed to advance quite close to him, and, then seeing no chance of escape, Chhagansingh surrendered himself to the police. As Dhannesingh was seen running away, one of the police party chased Dhannesingh. hit him with the butt-end of a gun and felled him down. Dhannesingh was immediately arrested.

The police recovered one rifle and a bandolier containing 32 live cartridges from the person of Chhagansingh. They also recovered six blank cartridges which were lying on the spot where the dacoits had taken up their positions. The police also

took in their custody the two camels on which the accused and his companions were riding. The Sub-Inspector, Churu, Shri Nathuram P. W. 3, commenced the usual investigation, and in due course challaned Dhannesingh and Chhagansingh in the court of the Sub-Divisional Magistrate, Ratangarh. The case was subsequently transferred to the Extra Magistrate, Churu, who committed the accused for trial to the Additional Sessions Judge, Churu. It may be pointed out here that the accused Mohania is still absconding. The remaining two accused Dhannesingh and Chhagansingh were convicted by the learned Additional Sessions Judge, Churu, and Chhagansingh has filed this appeal against his conviction. A fail appeal filed by Dhannesingh. was dismissed by a bench of this Court.

3. The accused Chhagansingh pleaded not guilty. and his defence was that he was going to village Tiddia, and the police arrested him on the way. Chhagansingh denied having fired at all and also denied that the rifle along with the cartridges was recovered from him.

4. Learned counsel for the accused, before dealing with the case on merits, relied on certain irregularities in the trial and urged that the whole trial was vitiated on account of those irregularities.

5. The first irregularity pointed out by learned counsel for the appellant was that the learned committing Magistrate had failed to ask the accused to furnish a list of such witnesses as the accused wished to be summoned to give evidence at the trial in the Court of Session under Section 211, Criminal P. C. The argument of the learned counsel was that a non-compliance with the provisions of Section 211, Criminal P. C., vitiated the trial. It may be pointed out, however, that on 31-5-1952, when the case came to the learned Sessions Judge's Court for trial, the learned Judge directed that witnesses both for the prosecution and defence be summoned. The case was then fixed for 16-6-1952, and the evidence of the witnesses, who were present, was recorded, It deserves to be noticed that on that date no application was made on behalf of the accused that he wanted to have any further witnesses summoned in his defence or that even otherwise he wished to produce any witnesses himself beyond those who had already been examined.

It is true that where the accused fails to furnish a list of witnesses on being so asked under S, 211, Criminal P. C., he is not entitled as of right to ask the Court of Session to summon witnesses at the trial, but that Court has doubtless a discretion in the matter and the learned Sessions Judge in a case like the present where the committing Magistrate had failed to perform his duty, may well have exercised his discretion in favour of the accused and allowed him fresh opportunity to have his witnesses summoned if the learned Judge had been moved to do so. But nothing of the kind was done on behalf of the accused. and I take it that the accused did not really want to produce any further evidence at the trial. Under these circumstances, I am of opinion that there is no substance in the objection raised by learned counsel for the appellant. It seems to me to be well established that a non-compliance with the provisions of Section 211, Criminal P. C., by itself is not sufficient to vitiate the trial unless a failure of justice has occurred. See -- 'Ramsingh v. The State', 1952 RLW 269 (A), in this connection. I am satisfied that a breach of the provisions of Section 211, Criminal P. C., has not really caused any prejudice or failure of justice in this case and I, therefore, overrule this objection.

6. Another irregularity which was urged with considerable force by learned counsel for the accused was that the learned Sessions Judge had not complied with the provisions of Section 325, Criminal P. C., because he had not summoned double the number of assessors required for the trial under that section. It was also urged that the assessors had not been chosen for the simple reason that out of the four assessors summoned for the trial, only three attended and the trial had taken place with the aid of these three assessors. Section 284, Criminal P. C. provides that when the trial is to be held with the aid of assessors, not less than three, and if practicable, four shall be chosen from the persons summoned to act as such. It is admitted that there was no deficiency as regards the minimum number of the assessors required at the trial. So far as the choosing of the assessors is concerned, it appears that although four assessors had been summoned by the learned Sessions Judge for the purposes of this trial, only three of them were served and attended upon the summons.

That being so, it cannot be gainsaid that if by 'Chosen', the intention of the Legislature is that there must be a choice out of a larger number, this condition was not fulfilled. Section 284, however, does not provide for any particular method of selection and, therefore, it cannot be said that the assessors must have been chosen by lot or by any other similar method. Besides, there is authority for the proposition that the word 'chosen' does not necessarily imply that there ought to be a selection out of a larger number. See -- 'Ram Babu v. Emperor', AIR 1938 Pat 60 (B). There is, therefore, no force in this part of the objection. So far as the remaining part of the objection under this head is concerned, it must be borne in mind that Section 326, Criminal P. C., envisages the summoning of jurors or assessors generally for all trials in a particular session and not with reference to any particular trial, and provides the minimum number should not be less than double the number required in any particular trial to be held during the session. It is not necessary, however, for a Sessions Judge invariably to summon jurors or assessors altogether for a whole session, and he may summon them for the purposes of any individual trial also. Section 327, Criminal P. C. gives him authority to do so.

But, even so, it is contended that the minimum of double the number of assessors required for a particular trial must be summoned. There is a two-fold answer to this contention. First, that Section 328 lays down a rule which should ordinarily be followed and in that sense it does not appear to be a mandatory requirement. In the second place, a transgression of this rule by itself does not amount to an illegality sufficient to vitiate a trial unless a failure of justice appears or is shown to have occurred to the accused by a breach of this rule. Reference may be made in this connection to -- 'Emperor v. Ermanali', AIR 1930 Cal 212 (FB) (C) and -- 'Lala v. Emperor', AIR 1933 All 941 (D). In these cases which related to the summoning of juries under Section 326, Criminal P. C., it was held that although the provisions of Section 326 were not strictly complied with, that was a mere irregularity which did not vitiate the trial, and was curable under the provisions of Section 537, Criminal P. C. The principle of these decisions applies, if only, with greater force to trials with the aid of assessors, and consequently I hold that the contention of learned counsel for the accused in this respect is without any substance.

7. Yet another objection has been strenuously urged on behalf of the accused that in the present case, after the learned Sessions Judge summed up the evidence both for the prosecution and the defence, and asked the assessors to state their opinion on the case, he committed a serious breach of the provisions of Section 309, Criminal P. C., because the learned Judge did not require the assessors to state their opinions distinctly on each separate charge for which the accused had been tried. Learned counsel stated that all that the learned Judge did in this case was that he put the following question (Question put in local language) to each one of the assessors and they individually replied (Answer in the same language). The argument of learned counsel is that the accused were being tried for two offences, one under Section 307, I. P. C., and another under Section 19 of the Arms Act, that the manner in which the learned Sessions Judge invited the opinion of each of the assessors and recorded their opinions was not, at all a sufficient or a proper compliance with the provisions of Section 309, Criminal P. C., and that the breach was an illegality which vitiated the trial and, therefore, the conviction and sentences passed on the accused must be quashed.

Learned counsel for the appellant has relied on -- 'Lal Behari Singh v. Emperor', AIR 1934 Oudh 304 (E), in support of his contention. In that case the appellants were convicted of offences under Sections 396, 147 and 333, I. P. C., and although the assessors stated that the accused were guilty of offences under certain sections of the Code, the opinion of the assessors in respect of the charge under Section 396, I. P. C., was not recorded. One of the assessors gave an opinion that the accused were guilty under Section 302 read with Section 149, I. P. C., although there was no charge against the accused under Section 302 read with Section 149. In these circumstances, it was held that the learned Sessions Judge was bound to record the opinion of each assessor in respect of all the charges for which the accused were being tried, and the learned Judge's failure to do so meant that he virtually tried the case without aid of assessors and such a trial was void in toto.

Learned Government Advocate has, on the other hand, referred me to -- 'Pattan v. Emperor', AIR 1945 All 87 (F), and has urged that as the learned trial Judge is not bound to conform to the opinions of the assessors the irregularity, if any, was not

at all a serious one and that it was curable under the provisions of Section 537, Criminal P. C. In the Allahabad case what happened was that the learned Sessions Judge had asked the opinion of the assessors on all the charges for which the accused were being tried, but the learned Judge failed to invite the opinion of the assessors on a further charge under which the accused were convicted by the learned Judge. It was held under these circumstances that the failure of the Judge to put questions to the assessors and to elicit their opinion on the further charge for which the accused had been convicted was a mere irregularity, and was not sufficient to vitiate their conviction.

Now, I have no hesitation in stating that it would have been far more desirable if the learned Sessions Judge had required each of the assessors to state distinctly his opinion on each one of the charges viz., under Section 307, I. P. C., and under Section 19 of the Arms Act, for which the accused were being tried. The learned Judge seems to have recorded the whole proceeding in a rather superficial manner, and one cannot be sure whether the assessors had clearly visualised the position that they were being required to state their opinions on both the charges with which the accused had been charged. The material point for determination, however, is whether the failure of the Judge in this respect is mere irregularity or an illegality sufficient to vitiate the trial, and cannot be cured by the provisions of Section 537, Criminal P. C. As the question is not free from doubt or difficulty and is of considerable importance and may arise in other cases, I consider it proper that the case may be laid before his Lordship the Chief Justice for being placed before a larger Bench for an authoritative pronouncement on this point. The point for reference may be stated as follows:

'Where a trial Judge fails to require each of the assessors to state his opinion distinctly on each of the charges for which the accused has been tried, whether such failure vitiates the trial, or is curable under the provisions of Section 537, Criminal P. C.?'

OP THE BENCH

Judgment was delivered by-

8. The question which has been referred to this Bench for decision has been formulated as follows:

'Where a trial Judge fails to require each of the assessors to state his opinion distinctly on each of the charges for which the accused has been tried, whether such failure vitiates the trial, or is curable under the provisions of Section 537, Criminal P. C.?'

9. The facts of the case out of which the reference has arisen have been stated at length in the referring order and need not be reiterated. All that we think necessary to state is that the accused was charged and convicted for two offences, one under Section 307, I. P. C., and the other under Section 19 of the Arms Act in a trial held with the aid of assessors. It appears that at the conclusion of the trial, the learned trial Judge summed up the evidence both for the prosecution and the defence and asked the assessors to state their opinions on the case. In doing so, however, he did not require the assessors to state their opinions distinctly on each one of the charges. In other words, the opinion was asked for and given in a rather vague manner. It was, therefore, urged by learned counsel for the appellant that the learned Judge had committed a breach of the provisions of Section 309, Criminal P. C., and that such a breach was fatal and vitiated the trial.

Learned counsel's argument was that Section 309, Criminal P. C., came to be amended in 1923 as a result of which certain words were added therein. The relevant portion of Section 309 as amended reads as follows:

'309. (1) When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally 'on all charges on which the accused has been tried', and shall record such opinion, 'and for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are. All such questions and the answers to them shall be recorded.'

(2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.' The underlining (here in ' ') is ours. It

was argued that the object of the amendment was that the Legislature wanted to make it imperative that the opinions of the assessors must be asked for on all the charges on which the accused has been tried. Learned counsel further argued that it was, therefore, obvious that the accused were entitled to have the opinions of the assessors recorded on all the charges separately and that a failure to comply with the requirements of law as laid down in the amended Section 309 amounted to an improper mode of trial sufficient to vitiate it, and was not curable under the provisions of Section 537, Criminal P. C. Learned counsel relied on a number of authorities to which we shall now refer.

10. The first case to which our attention was invited is -- 'Queen v. Matam Mal', 22 WR Cr 34 (G). That case arose under Act 10 of 1872 and the relevant provisions were contained in Sections 255 and 261, Criminal P. C., then in force. In that case the accused was tried under two charges viz., one of murder and the other of culpable homicide not amounting to murder. What had happened in that case was that the assessors had not given any opinion as to whether the prisoner had committed the offence of murder or any offence at all and what they had said was that the prisoner had struck his wife with a 'Dao' in consequence of abuse received from her. It was held by the learned Judges that the intention of the Legislature was that the assessors should have given a definite opinion whether the prisoner was guilty of any or which of the charges, but as that had not been done, the learned Judges held that they were unable to say whether the assessors did, in fact, mean to find the prisoner guilty of murder or of culpable homicide not amounting to murder, or of anything else, and, therefore, they set aside the conviction and remanded the case to the Court of Session with the direction to re-open the proceedings from the point at which the illegality had occurred, and to require the assessors to give their opinions definitely and thereafter to decide the case afresh. Learned counsel emphasised that even under the Code as it stood in 1874, it was insisted that the assessors must have been asked to state distinctly whether the accused were guilty of the offences under which they had been charged, and that the amendment of Section 309 made in the year 1923 put this requirement beyond all doubt or dispute.

11. The next case relied on by learned counsel for the appellant is -- 'Mt. Shevanti v. Emperor', AIR 1928 Nag 257 (H). In this case, the case referred to above in -- '22 WR Cr 34 (G)' was followed and it was held that the words 'on all charges' must be interpreted to mean that distinct opinion on each charge must be taken and recorded.

12. The next 'case relied on was -- 'Appaya Baslingappa v. Emperor', AIR 1924 Bom 246 (I). In that case the accused was charged with an offence of abetment of murder. The assessors returned a verdict of not guilty and the Sessions Judge acquitted him under that charge but instead convicted him under Section 201 of the Penal Code. The accused had not been charged under that section and no opinion of the assessors was invited on it. In these circumstances, it was held that it was imperative for the Judge to take the opinion of the assessors on the charge on which it was proposed to convict him and as that had not been done, the conviction was quashed and the accused was acquitted. We are of opinion that this case perhaps goes too far as it cannot be said that the opinion of the assessors was not taken on all the charges on which the accused was tried.

The general rule is that an accused person cannot be convicted of an offence with which he was not charged and of which he had no notice, but Sections 237 and 238, Criminal P. C., are exceptions to this rule and enable the Court to convict a person of an offence which is disclosed in the evidence and for which he might have been convicted although he was not charged with it. When a person is charged with an offence and the facts proved reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it, or a person may be convicted not of the offence itself but of an attempt to commit such an offence although he is not so separately charged. Thus, where the accused is [charged under Section 302 of the Penal Code and the opinions of the assessors were taken on such a charge, it is, in our opinion, open to the Sessions Judge under Section 237, Criminal P. C. to convict the accused under Section 201 of the Penal Code though the opinions of the assessors were not taken on that charge. In this connection we may refer to --'Begu v. Emperor', AIR 1925 PC 130 (J) although it was not cited at the bar.

In that case the accused were charged under Section 302, I. P. C., and the opinions of the assessors were invited on that charge but the Sessions Judge convicted some of the accused under that section and certain others under Section 201 although they were not charged of the offence under the latter section, and the opinions of the assessors were not asked for on that charge. It appears to have been urged before their Lordships of the Privy Council that the opinions of the assessors having not been asked for on the latter charge, the trial was bad. But their Lordships declined to interfere and observed that the aberration from the precise direction of the Code was not shown to have led to miscarriage of justice. We are of the opinion, therefore, that the -- 'Bombay case (I)' does not lay down the correct law and goes too far. In this view, the view taken in -- 'AIR 1945 All 87 (F)' that such a departure from the strict provisions of the Code is at best an irregularity not sufficient to vitiate the trial, seems to us to be the correct one.

13. We may next refer to -- 'AIR 1934 Oudh 354 (E)' on which learned counsel for the appellant strongly relied. In that case, it was held that

'in a trial with the aid of assessors, accused are entitled to have the opinion of the assessors recorded on all the charges framed against them under Section 309, Criminal P. C., and the failure of the trial Judge to comply with the provisions of that section in not having recorded the opinion of assessors as regards one of the charges, vitiates the trial.'

What had happened in that case was that although the accused were charged of an offence under Section 396, I. P. C., the opinion of the assessors was not asked for on that charge at all and yet the learned Sessions Judge convicted the accused under Section 396, I. P. C. It was observed by the learned Judges that the Sessions Judge was bound to record the opinion of each assessor in respect of all the charges of which the accused had been tried and his failure to do so showed that it amounted to a disregard of an express provision of law as to the mode of trial and was therefore, sufficient to vitiate it in conformity with the principle laid down by their Lordships of the Privy Council in -- 'N.A. Subramania Iyer v. King Emperor', 28 Ind App 257 (K). We wish to emphasize in connection with this case that the accused were being tried there for a particular offence and were charged

under it and still the learned Sessions Judge did not invite the opinion of the assessors on that charge and convicted the accused of it. This clearly amounted to a grave breach of the provisions of Section 309, Criminal P. C., and was not curable under Section 537, Criminal P. C.

14. The next case to which we may now refer is -- 'Manjur v. State', AIR 1950 Madh-B 37 (PB) (L). In that case the accused were tried on charges under Sections 148, 149 and 302 of the Penal Code but the assessors were not asked to give their opinions on each charge separately and all that they said was that the accused were guilty of murder. The question in these circumstances arose whether the trial was vitiated for non-compliance with the provisions of Section 309, Criminal P. C. It was held that the mere omission to record an opinion as regards the charge under Section 148, I. P. C. was of no consequence as the accused had been acquitted of that charge. As regards the conviction under Section 302, it was pointed out that the charge against the accused appeared to be under Section 302 read with Section 149, I. P. C., although the body of the charge mentioned the individual act of the accused causing the murder with the result that the accused was convicted of murder (Section 302) on a charge of Section 302 read with Section 149, I. P. C., and it was not at all clear that the opinion of the assessors was taken with respect to his constructive liability for the murder or for the substantive offence of murder.

In these circumstances, it was considered that it could not be said with certainty whether the question before the assessors was anything else than that of joint liability which in case of some 01 the accused was certainly there, and it was, therefore, held that the conviction of the accused under Section 302, I. P. C. could not be sustained. It was further held, however, that the trial became bad only from the point from where the Court, should have required the assessors to state their opinion on each charge, and the case was remanded for a fresh disposal after recording the opinion of the assessors on each charge, that is, under Sections 148, 302 read with Section 149 and also Section 302, I. P. C. The learned Judges further pointed out that where; the Sessions Judge fails to record the opinion of the assessors on each of the charges on which the accused persons were being tried, it is a question in each case whether such failure would amount to a material

irregularity sufficient to vitiate the trial or not. The question to determine would be whether the questions put to assessors and their opinions indicate an application of their mind to all the charges or not and whether the form of the question or opinion as recorded discloses a prejudice and has occasioned a failure of justice.

15. A careful analysis of the provisions of the Criminal Procedure Code and the authorities on this point leads us to the conclusion that it is eminently desirable that in all trials with the aid of assessors, the trial Judge should be careful to place all the charges on which the accused are being tried clearly to each of the assessors and should record their' opinions on all the charges put to them. It may be that even though the Judge has put all the charges to each of the assessors, he may not have understood the questions put to him and, therefore, may not have given his opinion on any one of the charges. In such a case, it is the further duty of the learned Judge to put supplementary questions in the matter so that the opinion of each assessor on each charge is properly and intelligibly given. It is further necessary that the trial Judge should prepare a proper record of all such questions and answers so that it may be possible for this Court, to find out whether the provisions of Section 309 have been properly followed in any case in which a failure to observe the provisions of that section is urged on behalf of the accused.

We have no doubt that a careful compliance with these instructions would reduce the possibility of re-trials and save considerable time and money. At the same time we cannot lay down a universal rule that a breach of the provisions of Section 309, Criminal P. C. would amount to a material irregularity sufficient to vitiate the trial in every case. The correct view of law appears to be that it will be a matter to decide in each case whether the irregularity alleged is a material one and amounts to an improper mode of trial which would vitiate it, or a mere irregularity which would be curable under the provisions of Section 537, Criminal P. C. Thus, it may happen that the trial Judge may not have invited opinions of the assessors at all on any of the charges for which the accused is tried in a case. We have no doubt that in such a case the trial is an improper trial and such an irregularity cannot be cured under Section 537, Criminal P. C.

16. Another class of cases would be where the opinion of the assessors may have been asked on some charges on which the accused has been tried but not on others. In this type of cases which are exemplified by the 'Oudh case (E)', referred to above, it would also appear to us that the irregularity committed is a serious one and would be such as to cause prejudice to the accused and the failure to comply with the provisions of Section 30y, Criminal P. C. would not be curable under Section 537, Criminal P. C. The above rule will, however, not apply to cases where a person is charged with a graver offence and is convicted of a minor one, and similar other cases. The present case does not appear to us to fall within any of the two categories pointed out above.

There is, in our opinion, a third category of cases where the question put by the trial Judge is vague and the answer is also vague. The present case appears to us to be a case of this kind. In such cases, the question to determine would be whether it can be held that the learned Judge put all the charges to the assessors and they rendered their opinions on all of them. If that could be said in a case of this kind, we are of the view that mere vagueness in the putting of questions and the answers would not be an irregularity sufficient to vitiate a trial. On the other hand, if it cannot be postulated in such a case that the learned Judge has put all the charges to the assessors and it appears that he omitted to put some of them, and that the assessors returned their answers only on some of the charges put to them, but not on all the charges or on none at all, then we have no hesitation in saying that such an irregularity would amount to an improper mode of trial and would not be curable and the conviction in such cases could not be sustained and the accused must be retried from the stage at which the irregularity occurred.

17. Our answer to the point of reference, therefore, cannot be a simple affirmative or a negative and is on the lines indicated above. It will be for the learned single Judge to decide on the facts of this case whether the irregularity alleged falls within one or the other category of cases pointed out by us above, and then to decide whether the irregularity is curable under Section 537, Cr. P. C. or is a material one sufficient to vitiate the trial. With this answer, let the reference be returned.

