

In Re: Dervish Hussain

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Court : Chennai

Decided On : Nov-03-1922

Reported in : 71Ind.Cas.212; (1923)44MLJ84

Appellant : In Re: Dervish Hussain

Judgement :

ORDER

Wallace, J.

1. Two points are taken by petitioner (1) that he was refused opportunity to have his defence evidence produced; (2) that the Bench Court has recorded no reasons for his conviction.

2. As to point (I) after a good deal of searching of records rendered necessary by the inaccurate reports of the Honorary Presidency Magistrate's Court, it was verified that the petitioner had paid batta for a subpoena for the production on 20th December, 1921, of two Police diaries from D2 and D3 Stations and that subpoenas were issued accordingly. Service was effected too late and neither diary was produced on 20th December 1921. The case was taken up on several dates after that on 3rd January 1922, 10th January 1922 and 24th January 1922, but on none of these dates did petitioner ask for any further subpoenas or warrants for the production of these diaries nor was any taken out. On the date of final hearing, 31st January 1922, the Bench Court refused further adjournment on

the ground that defence witnesses (six) though served were absent. In the circumstances I consider the refusal was fully justified.

3. As to point (2) It is the case that the Bench Court has recorded no reasons whatever for convicting petitioner and the question is whether this omission to obey the terms of Section 263(h) Criminal Procedure Code is an irregularity which wholly vitiates the trial, or, if not, whether petitioner has been gravely prejudiced by the omission. This is not a case which Section 370(i) will remedy since a substantive sentence of imprisonment has been passed and therefore under Section 370(i) as equally under Section 263(h) the Honorary Presidency Magistrate should have recorded reasons. The Crown Prosecutor argues that the defect is cured by Section 441 which permits a Presidency Magistrate to submit with the record, when called for under Section 435, a statement setting forth the grounds of his decision. But as a matter of law, it is clear that Section 441 does not abrogate the terms of Section 263 or Section 370. I take it that it merely allows the Presidency Magistrate to supplement the reasons which have been already stated under Sections 263 and 370.

4. Under Section 537 however, this Court will not upset a conviction on the ground of irregularity in the Judgment unless a failure of justice has resulted. My attention has been called by petitioner to certain rulings e.g. *Queen Empress v. Shidgauda* (40 M.L.J. 479 (F.B.)) and *In the matter of the petition of Punjab Singh* 2 passed under Section 213(h) or its equivalent Section 227(h) in the former Code, wherein these courts held that the omission to record reasons was in itself a sufficient ground for interference in revision. Neither of these cases was a case of judgment by a Presidency Magistrate. As a general rule I consider the principle of these rulings viz., that the Magistrate must state reasons so that the High Court may judge whether there were sufficient materials before him to support the conviction perfectly sound. Rulings quoted on the opposite side such as *King Emperor v. Alagirisami Pathan* I.L.R.(1881) . C. 579 *Tilak Chandra Sarkar v. Baisa Gomoff* I.L.R.(1896) Cal 502 deal with other sections of the Code such as Section 202 or 367 and neither deals with a case of a Presidency Magistrate or of a summary trial. It is one thing to hold that in a case where all the record before the original trying Court is also available before the High Court in revision, no substantial

failure of justice has occurred by the omission of the trying court to record reasons. It is a very different case when the conviction was passed without reasons therefor on evidence of which no record is taken and which therefore is not available to the High Court. In such a case I agree with the rulings already quoted that the omission to record reasons is a grave irregularity which in most cases would be sufficient ground for interference.

5. But in the case of convictions by Presidency Magistrates there is the saving Section 441 and when the record submitted under that section discloses sufficient grounds for the decision, it may be taken into consideration. The reports submitted in this case by the Bench on 23th February 1922 and 17th October 1922 show that the Magistrates had a clear recollection of the case and the evidence recorded therein and had good grounds for their decision, Considering these, as under Section 441 they may be considered, as setting forth the reasons for the conviction of petitioner, I am of opinion that no substantial failure of justice has occurred in his case.

6. I am asked to interfere with the sentence. It is a stiff sentence, but I am not prepared to interfere with the discretion of the Honorary Presidency Magistrate in this case. I dismiss the petition.

7. I would impress on the Bench the necessity of obeying Sections 263 and 373 Criminal Procedure Code in future.

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