

In Re: Raju Achari

In Re: Raju Achari

SooperKanoon Citation : sooperkanoon.com/796865

Court : Chennai

Decided On : Sep-14-1926

Reported in : AIR1927Mad78; (1926)51MLJ687

Appellant : In Re: Raju Achari

Judgement :

ORDER

Jackson, J.

1. Petitioner has been convicted under Sections 323, 114, Indian Penal Code, by the Honorary Presidency Magistrates, Royapettah, and seeks to set aside the conviction because the Magistrate asked him forthwith whether he wished to cross-examine the prosecution witnesses without recording his reasons under Section 256, Code of Criminal Procedure.

2. It was probably intended by the Code as originally framed that in warrant cases the Magistrate should examine the prosecution witnesses-in-chief, and, if necessary, frame a charge without the intervention of the accused. At the next hearing, the accused could engage his vakil and cross-examine the prosecution witnesses. Accused persons, however, considered, probably not without reason, that by the time the case reached the charge if the Magistrate had only heard one side his opinion might be too firmly fixed to be shaken. They preferred therefore to cross-examine the prosecution witnesses at the outset. In such a case, a second

cross-examination after the charge might often seem a waste of time, and Magistrates were disposed to call upon the accused to re-cross-examine immediately after they had framed the charge. The accused would protest that they were still entitled to the interval which would be allowed them if they had not chosen to cross-examine and when the Magistrate proved obdurate, dissension and a sense of injustice often supervened.

3. Therefore by Section 72, Act XVIII of 1923, Section 256 was amended by inserting after the words 'to state' the words

at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith.

4. This appears to be a very sensible solution of the difficulty. The Magistrate still controls the procedure, but if his ruling runs counter to the wishes of the accused he must support it by reasons. Where the accused is represented by a vakil from the outset he may generally be asked under the section if he wishes to cross-examine forthwith, for the simple reason that the accused will not be prejudiced and it is convenient to arrange a date for the subsequent attendance of the prosecution witnesses before they disperse.

5. If, however, he is asked forthwith, with a view to recalling the witnesses forthwith, fuller reasons will be required, because it is usually convenient to the accused to have an interval in which to study the depositions already on record, and discover material for the cross-examination of the witnesses.

6. If an accused is not represented by a vakil, reason must be shown for not postponing the question to the next hearing by which time he can have consulted a vakil.

7. In the present case the accused was not represented by a vakil, was required forthwith to state if he wished to cross-examine and the Magistrate recorded no reasons.

8. It is argued on behalf of the Crown that this is an irregularity curable under Section 537 of the Code of Criminal Procedure. It is difficult to apply this section to

the facts of a case of this nature, for when can it be said that no failure of justice has been occasioned by refusing an accused an opportunity to consult a legal adviser? Nor do I think it applicable in law.

9. Before it was amended, Section 256 was undoubtedly mandatory. If a Magistrate omitted altogether to ask the accused if he wished to cross-examine the prosecution witnesses, it could not be said to be a mere irregularity. And when the Legislature specially amplifies a mandatory section, there is in my opinion no rule of construction which will allow the Courts to treat it as directory. No doubt a contrary opinion is expressed but without argument, in *Mi. Ghasiti v. The Crown* (1925) 6 Lah 554 and I can only say that I respectfully differ. In *Phuman Singh v. The Crown* AIR 1925 Lah 339 Campbell, J., holds that a contravention of Section 256 is covered by Section 537, but notes the difficulty which I have mentioned above of holding as a matter of fact that accused has not been prejudiced. As regards the law in that case, I doubt if it can really be argued that because Section 535, Criminal Procedure Code, validates a conviction which is attacked merely because no charge has been framed, therefore Section 537 validates a trial in which Section 256 has been contravened. The safest guide in these questions is the well-known ruling of the judicial Committee. Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity, *Subramania Aiyar v. King Emperor* 11 M L J 233 (P C).

10. In Bombay it has been held that Section 256 is not applicable to a summary trial [*Umaji Krishnaji v. Emperor* AIR 1936 Bom 236] and again I must express dissent. It is argued that Section 262, which pro-vides that the procedure of warrant cases shall apply to warrant cases summarily tried except where otherwise mentioned, does not make Section 256 applicable to summary trials, because Section 263 relieves the Magistrate of the necessity of framing a formal charge. Section 256 clearly implies that the Court has had a charge read. It is only then that the occasion arises under which the accused is required to state whether he wishes to cross-examine.

11. But there is no such clear implication in Section 256, which makes no reference at all to a charge, and only happens to come below Section 255

because in the natural order of things the indictment precedes the defence. Whether an accused is tried under Ch. XXI or Ch. XXII, and whatever form the charge may take he must be called upon to plead, and Section 256 which provides for the defence is applicable to either sort of trial. Madgavkar, J. 93 I.C. 160 holds that in a summary trial there can be no reason for re-cross-examination, but seems to overlook a case like the present case where the accused is put on his defence before he is represented by a vakil.

12. The petition is allowed and petitioner ordered to be retried by the Chief Presidency Magistrate, or any Magistrate having jurisdiction to whom he transfers the case.

13. The conviction and sentence are set aside and the fine, if paid, is to be refunded.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com