

Gomer Sirda and ors. Vs. Queen-empress on the Complaint of Ali Shiekh

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Court : Kolkata

Decided On : May-12-1898

Reported in : (1898)ILR25Cal863

Judge : Francis W. Maclean, ;K.C.I.E., C.J. and ;Banerjee, JJ.

Appellant : Gomer Sirda and ors.

Respondent : Queen-empress on the Complaint of Ali Shiekh

Judgement :

Maclean, C.J.

1. It is only necessary to refer to one or two facts in the history of this case. The petitioners were convicted of rioting on the 15th of March 1897, from which conviction they appealed to the Sessions Judge, who upheld the conviction. An application was then made to this Court to have the conviction set aside, upon the ground, to put it shortly, that the Magistrate had not exercised a proper judicial discretion, in refusing to allow certain witnesses, whom the accused desired to call, to be called.

2. That application was successful, and on the 5th July 1897, this Court made the rule absolute, and to quote the language of the Judges, they 'set aside the conviction and sentence and sent the case back for re-trial, the Magistrate commencing the investigation from the point at which it was left on the 15th March before he delivered judgment.'

3. It is obvious that the Judges of this Court were under the impression that the same Magistrate would continue to hear the case. It appears, however, that Magistrate had left the District, and another Magistrate had taken his place. The observations of the Judges of this Court, as to the Magistrate taking up the case where he had left it could not apply, and I am satisfied, were not intended to apply, to the second Magistrate, who had not heard any portion of the evidence.

4. Then what occurred was this: I ought to mention that during this time the accused were out on bail. On the 6th August 1897 a mukhtear, purporting to appear for the accused, and I will assume, though the accused swear the contrary, that he had authority from them so to do, applied to the second Magistrate that certain processes for the attendance of witnesses for the accused might issue, and on the 9th of the same month, apparently upon the application of the same mukhtear, an order, as appears from the order sheet, was passed directing that warrants should issue against the witnesses named. On the 27th August, which was the first day upon which the accused were ordered to attend to be tried, the case was called on, and the accused at once demanded that the witnesses who had been previously examined before the other Magistrate should be re-summoned and re-heard. The second Magistrate had not heard any of this evidence. The Magistrate refused that application upon the ground that the accused were too late in making it. His view, as I understand it, was that he had commenced his proceedings in the trial when he acceded to the applications of the 6th and 9th August, and that the demand by the accused can only be made when he commences his proceedings in the trial. To my mind this view is not well founded, and is calculated to materially prejudice the accused. The question turns upon the construction of proviso (a) to Section 350 of the Code of Criminal Procedure, as to which I cannot think there can be any reasonable doubt. That proviso is in the following terms: 'In any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard.' It will be noticed that the primary, and, in one sense, the governing words of the proviso are, 'in any trial,' and, in my opinion, when the proviso speaks of the Second Magistrate commencing his proceedings it must mean his proceedings upon that 'trial.' Now what is the 'trial'? The 'trial' to my thinking means the proceeding which commences when the case

is called on, with the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecution, and for the defence if the accused be defended, are present in Court for the hearing of the case. That is, I consider, the proceeding which is intended by the term 'trial,' and in my opinion the proper time for the accused to ask for the re-summoning and re-hearing of the witnesses is as soon as that trial commences before the Magistrate, and that he is entitled to make the demand at that time. The view placed upon the proviso by the Magistrate is far too narrow, for it means that the accused has lost the right given him by the proviso because an interlocutory application, as in this case, for enforcing the attendance of certain witnesses may have been previously granted by the Magistrate. This interlocutory order was not made at the trial, but before the trial, and with a view to the trial. In his explanation the Magistrate appears to attach but little Importance to seeing the witnesses, but this would scarcely appear to be a view shared by the Legislature, which, in the interests of the accused, has passed the proviso in question. As a general rule I think the Second Magistrate taking up the case would be well advised to hear the whole case de novo. I may add, though in the view I take it is not necessary to decide it, that I am by no means satisfied that under the circumstances we could not have interfered under proviso (b) to Section 350. It is unfortunate that both the Magistrates in this case should have miscarried in their procedure, as there must be a retrial, virtually a third trial, and after the lapse of time since the occurrence, if an offence have been committed, as to which I express no opinion, the difficulty of proving the case may be increased. The rule must be made absolute, and as I understand the second Magistrate has now left the district, the case must be retried before the Magistrate who has taken his place.

Banerjee, J.

5. I am of the same opinion. We are asked to set aside the conviction and sentence in this case on the ground that the Magistrate has acted in contravention of Section 350 of the Code of Criminal Procedure in deciding this case upon evidence recorded by his predecessor and in disallowing the application of the petitioners for the re-summoning and re-hearing of the witnesses. The ground upon which the Magistrate appears to have disallowed that application was that it

was not made when he commenced the proceedings within the meaning of proviso (a) of Section 350, but was made at the third hearing of the case before him. Now this is how the facts stand: The accused, the petitioner before us, who had been originally convicted, having moved this Court, this Court set aside the conviction and sentence and sent the case back for retrial.

6. The first order that was recorded after the remand was dated the 6th August, and was an order recorded before the accused had appeared in Court. It was recorded in the presence of the gentleman who had acted as their mukhtear at the previous trial, and directed the mukhtear to put in a list of witnesses against whom he wanted processes to issue.

7. The second order, which was recorded on the 9th August, was simply to this effect that warrants should issue against the witnesses named. And it was not until the day on which the third order was recorded, namely, the 27th August, that the accused appeared before the Magistrate; and on the same day they made an application under Section 350 of the Code of Criminal Procedure for the re-summoning and re-hearing of the witnesses who had been examined for the prosecution at the previous trial; and the question is whether it can be said that the proceedings after remand, that is, the proceedings before the Magistrate, who subsequently took up the case, commenced before the 27th August.

8. I am clearly of opinion that the question must be answered in the negative. For, although two orders were recorded previous to the 27th August, there is nothing to show that the accused had notice to appear before that day.

9. I may here observe that the procedure ordinarily observed, and the procedure which ought to be observed, when a case is remanded by a superior Court, should be for the inferior Court to make a preliminary order calling upon the parties to appear on a certain day on which the proceedings should commence. This does not appear to have been done here.

10. In all probability what was done was to send for the person who had acted as the mukhtear of the accused, and to call upon him to put in his list of witnesses, as the order of the 6th August would go to show.

11. The petitioners in their affidavit deny that this mukhtear had any instructions from them before they had entered appearance, and there is nothing to show that the mukhtear had any instructions from them previous to that.

12. That being so, as has been very fully and clearly shown by the learned Chief Justice, the retrial could not be held to have commenced before the 27th, which was the first day when the accused entered appearance after remand; and if the retrial had not commenced, it could not be said that the proceedings of the Magistrate had commenced before that day.

13. I am, therefore, clearly of opinion that the Magistrate acted in contravention of the provisions of Section 350 in refusing the application of the petitioner for the re-summoning and re-hearing of the witnesses.

14. A point was discussed as to whether Section 537 of the Code may not have the effect of curing the defect in the proceedings by reason of the Magistrate's refusal to re-summon and re-hear the witnesses. I am of opinion that that section cannot cure the defect. For it is of the utmost importance that the first Court that has to try a case should have an opportunity of observing the manner and demeanour of the witnesses in order that it may form a correct estimate of their evidence.

15. The only exception that the Code of Criminal Procedure contemplates is that referred to in Section 360. That provision is made evidently to meet the exigencies of the public service; but even that section provides that where the accused demands that the witnesses should be re-summoned and re-heard by a succeeding Magistrate, who takes up a case before it is finished, the demand should be complied with. A trial held by a Magistrate presiding in the Court of First Instance upon evidence not recorded by him, and upon evidence given by witnesses, whose manner and demeanour he had not the advantage of observing, must ordinarily be considered to be a trial held not according to law, and without one of the most important guarantees for a correct decision; and if that is so, we must say that there has been a failure of justice. Section 537 therefore cannot cure the defect in this case.

16. Before concluding I wish to make one observation with reference to what has been said by the Magistrate in his explanation, namely, that where an occurrence has taken place many months before a witness gives his evidence, the advantage of observing his demeanour is not of much value.

17. I do not think that the question of time has anything to do with the matter. The advantage to be derived from observing the demeanour of witnesses is one that ought never to be undervalued.

18. The conviction and sentences will be quashed, and there must be a fresh trial before another Magistrate.

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