

Abdullah Bhat Vs. Ghulam Mohd.

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Court : Jammu and Kashmir

Decided On : Oct-25-1971

Reported in : 1972CriLJ277

Judge : S. Murtaza Fazal Ali, C.J.,; J.N. Bhat,; Jaswant Singh,; Mian Jalal-ud-Din and;

Appellant : Abdullah Bhat

Respondent : Ghulam Mohd.

Judgement :

Mufti Baha-ud-Din Farooqi, J.

1. The question which the Full Court is called upon to determine may be put as under:
2. Whether a process issued on a complaint for the appearance of the accused without the complainant filing a list of witnesses in compliance with the provisions of Section 204 (1A) of the Code of Criminal Procedure is an illegality which cuts at the root of the jurisdiction rendering the subsequent proceedings null and void or whether it is a curable irregularity in which prejudice should be the balancing factor.

2A. The facts are these; One, Ghulam Mohd. Wani brought a complaint under Section 494 R. P. C. against Abdullah Bhat and others in the court of Judicial Magistrate 1st Class. Handwara. The complaint was not accompanied by a list of witnesses nor was one incorporated in the petition of the complaint itself. The learned Magistrate, however, examined the complainant and his one witness and issued process for the appearance of the accused. After the accused put in their appearance, the complainant filed a list of witnesses who were summoned and examined by the complainant and then also cross-examined by the accused who were represented by a lawyer. Eventually, two of them were committed for trial to the Court of Session and those remaining were discharged. In the Sessions Court an objection was raised on behalf of the accused that the proceedings were invalid from the very start for the reason that the accused were summoned initially without the complainant filing a list of witnesses as required under Section 204 (1-A). The learned Sessions Judge overruled the objection. The accused have come in revision to this Court, which was heard by two of us. In the course of hearing it transpired that there was a divergence of judicial opinion as regards the effect that the non-compliance with Section 204 (1-A) of the Code of Criminal Procedure would have on the subsequent proceedings. As such the case has been referred to the Full Court for an authoritative pronouncement in the matter.

3. Section 204 (1-A) of the Code of Criminal Procedure reads:

No summons or warrant shall be issued against the accused under Sub-section (I) until a list of the prosecution witnesses has been filed.

4. Viewed strictly on its terms the provision may suggest that any violation thereof cuts at the root of the jurisdiction and renders the subsequent proceedings void but that is not, in our opinion, a true criterion. In matters like the present it is the essence and not the form which should weigh with courts in assessing the nature of the violation and its effect. The real test should be whether the violation is so vital that it strikes at the foundation of the concept of a fair trial contemplated by the Code of Criminal Procedure or in any case whether it is so repugnant to the well settled principles of natural justice that it would amount to negation of such principles or is of a less vital character involving a 'technical' and not a 'substantial'

departure from such concept or principles as aforesaid. In the first case the court may at once strike down the proceedings as illegal but not so in the second case when it should pause and see if any prejudice was in fact occasioned to the accused.

5. This is, in our opinion, the recent trend of judicial thinking summed up by Hon'ble Bose J. in : 1956 CriLJ291 where his Lordship says:

We prefer this way of stating the law. for the distinction that was once sought to be drawn between an express prohibition and an equally express provision positively stated strikes us unreal. The real question is not whether a matter is expressed positively or is stated in negative terms but whether disregard of a particular provision amounts to 'substantial' denial of a trial as contemplated by the Code and understood by the comprehensive expression 'natural justice.

It will be observed that disregard of an express prohibition was regarded as curable in *Zahiruddin v. Emperor* AIR 1947 PC 75 (H). so the question whether a particular provision is stated in positive or in negative terms is not the true criterion.' (AIR 1956 SC 116). In fact the key to the problem like the one before us has been provided by the court in general terms at page 121 as under:

The Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well established and well understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is 'substantial' compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That broadly speaking, is the basic principle on which the Code is based.

Now here, as in all procedural laws, certain things are regarded as vital. Disregard of a provision of that nature is fatal to the trial and at once invalidates the conviction. Others are not vital and whatever the irregularity they can be cured; and in that event the conviction must stand unless the Court is satisfied that there was prejudice. Some of these matters are dealt with by the Code and wherever that is the case full effect must be given to its provisions.' and more pointedly at page 122 in these words:

Except where there is something so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice, the matter resolves itself to a question of prejudice. Some violations of the Code will be so obvious that they will speak for themselves as, for example, a refusal to give the accused a hearing, a refusal to allow him to defend himself, a refusal to explain the nature of the charge to him and so forth.

These go to the foundations of natural justice and would be struck down as illegal forthwith. It hardly matters whether this is because prejudice is then patent or because it is so abhorrent to well-established notions of natural justice that a trial of that kind is only a mockery of a trial and not of the kind envisaged by the laws of our land, because either way they would be struck down at once.

Other violations will not be so obvious and it may be possible to show that having regard to all that occurred no prejudice was occasioned or that there was no reasonable probability of prejudice. In still another class of case, the matter may be so near the border line that very slight evidence of a reasonable possibility of prejudice would swing the balance in favour of the accused.

6. Reverting to Section 204 (1-A) it is clear to us that the object of this provision is not to introduce a requirement that goes to the root of the jurisdiction, as for example, the requirement of previous sanction under Section 197, but to serve a two-fold purpose; one to apprise the accused at the earliest opportunity of the persons who are likely to give evidence against him and second, to scuttle any attempt on the part of the complainant subsequently to improve the state of evidence by made-up witnesses. This may give a valuable right to the accused but it is not certainly one which the law regards as fundamental or sacred in that the

list of witnesses, as aforesaid, may be added to, modified, or otherwise varied in the subsequent proceedings under Section 208 if the offence is one triable by a Court of Session or at the trial under Section 252 if the case is a warrant case and under Section 244. if the case is a summons case, the reason being that in all these sections the law provides that the Magistrate shall take 'all such evidence' as the complainant may produce implying that he shall not be tied down to the list of witnesses already furnished by him with the complaint. Again the provision is analogous to Section 173 (4) which provides that in cases instituted upon police report as distinguished from 'complaint' the investigating officer shall be under an obligation to supply, before the commencement of the enquiry, to the accused not only the list of persons proposed to be examined by the prosecution but also copies of their statements recorded under Section 161 as also copies of other documents or relevant extract therefrom which the prosecution proposes to rely upon. The trend of the decisions of the Supreme Court as reflected in : 1957 CriLJ1320 and : 1964 CriLJ167 is that non-supply of such copies is not a matter affecting the jurisdiction of the court but it may vitiate the trial depending on whether or not prejudice was caused to the accused. In this, the court relied upon the provisions of Section 537 of the Code of Criminal Procedure which provide amongst other things that subject to the provisions contained in the Code no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, or judgment or other proceedings before or during the trial or in any inquiry or other proceedings under the Code unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice. In our opinion, the omission to file a list of witnesses along with the complaint should not have a more far reaching effect than the omission to carry out the provisions of Section 173(4). In every such case therefore, the guiding principle should be if any prejudice was caused to the accused. This is a question of fact which will hinge on the facts and circumstances of each case.

7. For these reasons we are not inclined to agree with the view that the provisions of Section 204 (1-A) are mandatory in the sense that a process issued on a complaint before the filing of the list of witnesses would be invalid or invalidate the subsequent proceedings which is the view taken in . : AIR1968 Cal266 and also by

this Court in case, H. Ghulam Mohd. Barza v. Hazra Begum decided on 31-10-1969, and also seems to be the view implied in the case reported in : AIR 1958 MP28 . Nor are we prepared to simplify the matter as was done in : AIR1960 All394 where it was said that Section 204 (1-A) imposes a condition on the issue of summons against the accused and once a summons is issued it ceases to be of any relevance and does not govern the subsequent procedure. On the other hand we would say that the breach of the provisions of Section 204 (1-A) is not a matter going to the root of the jurisdiction but only a curable irregularity under Section 537 Cr. P. C. in which prejudice should be the balancing factor.

8. We now turn to the question of fact; is there material in this case to justify a finding of prejudice? The facts bearing on this point, as may be gathered from the file, are that immediately after the accused put in their appearance in the Committing Court in obedience to the summons issued against them, the complainant filed a list of witnesses which he proposed to examine in the case. These witnesses were summoned and examined by the complainant and then cross-examined by the accused through their lawyer throughout. This would show that they had advance information of the witnesses which were actually examined during the commitment proceedings. To this may be added the fact that no objection was raised about the omission complained of till the case came to the Court of Session although the accused were represented throughout by a lawyer and the omission was so patent that an objection could be and should have been taken about it at an early, stage in the committing Court. This is an important circumstance against the inference of prejudice under Section 537 Cr. P. C. which governs the present case, in that the explanation to the said section says that in determining whether any error, omission or irregularity in any proceedings under the Code has occasioned a failure of justice, the court shall have regard to the fact whether the objection would and should have been raised at an earlier stage in the proceedings. In this state of the matter no prejudice can be reasonably inferred to have been caused to the accused.

9. In the result we find no force In this revision petition which is hereby dismissed,

Mian Jalal-ud-Din, J.

I agree.

Jaswant Singh, J.

10. I have had the advantage of perusing the judgment prepared by my learned brother Mufti Baha-ud-Din Farooqi J but regret. I do not find myself in agreement with the conclusions arrived at by him. Section 204 (1-A) of the Code of Criminal Procedure as reproduced by him contains an express prohibition against the issue of process against the accused to appear and answer the charge until a list of prosecution witnesses is filed. This provision, as pointed out by my learned brother is designed to apprise the accused at the earliest point of time of the persons who are likely to give evidence against him so that he may be in a position to cross-examine them effectively after finding out as to why they are deposing against him and to guard against any possible attempt at fabricating evidence. If that was the avowed object which the legislature had in view in inserting the provision. I fail to understand how the omission to file the list does not cause prejudice to the accused. The prosecution may be able under certain circumstances to supplement the list but that cannot obviate the necessity of filing the list before the issue of process. In fact any action taken without the filing of the list is according to the tenor of the provision invalid. The fact that Section 204 (1-B) is directory does not mean that Section 204 (1-A) is also directory and its non-compliance does not vitiate the subsequent proceedings, I am tempted in this connection to refer to the following observations made by Dua J. in *Ram Narain v. Bishember Nath* :

Clauses (1A) and (1B) of Section 204 are enacted in the interest and for the protection of the accused. Their disregard is likely to injuriously affect the accused.

The provisions of Clause (1B) are merely directory in the sense that failure to attach a copy of the complaint with the summonses does not by itself completely invalidate or nullify the issue of the process. The supply of such a copy to the accused on or before his appearance, though it was not attached with the summonses, may cure the defect; at worst, adjournment would generally speaking, place the accused, for all practical purposes, in the same position as if such a copy had originally accompanied the summonses. Section 537, would thus

cure the defect. This however, does not mean that a Magistrate can with impunity disregard these statutory directions. He is expected to obey and carry out the provisions of law as much as any one else is; indeed as a Court of justice his obligation is all the greater to see that law, is properly administered; and if an accused has been prejudiced by such an order, it is liable to be set aside.

The provisions of Clause (IA). however, are mandatory in the sense that a process issued before the filing of the list of witnesses would be invalid. This clause is couched in a negative language, and it goes to the power of the Magistrate to issue summonses or warrants, as the case may be. The provisions which enjoin the Courts to satisfy themselves about the prima facie nature of a criminal charge, before issuing a process must be intended in the absence of a clear suggestion to the contrary, to be mandatory.

The Madhya Pradesh High Court has also in *Chaturbhuj V. Naharkhan* : AIR 1958 MP28 held that the filing of the list of prosecution witnesses is essential before the issue of process under Clause (1-A) of Section 204 the wording of which is mandatory.

11. The observations made by this Court in *Ghulam Mohamad Burza v. Hajira Begum* are also in accord with this view.

12. In view of the foregoing. I am of the opinion that the filing of the list of prosecution witnesses before issue of process is of vital importance and its non-compliance vitiates subsequent proceedings unless the complainant is the only witness in the case.

13. Accordingly I would quash the proceedings commencing with the issue of process and relegate the parties to the position they occupied before the order for issue of process was made.

J.N. Bhat, J.

14. I have had the privilege of going through the judgment written by my learned Brother Mufti J. with which my learned brother Mian Jalal-ud-Din J. has concurred

as well as the dissenting judgment written by my learned brother Jaswant Singh J. After giving some attention to the question involved in this case. I feel inclined to agree with my learned brothers Mufti and Main Jalal-ud-Din JJ. I shall give some of the reasons which led me to this conclusion.

15. The point for determination is whether proceedings in a criminal complaint which is not accompanied by the list of prosecution witnesses, are vitiated and rendered illegal from the stage of issue of process or compliance with this provision, which is contained in Section 204 (1-A) of the Code of Criminal Procedure, is mandatory or non-compliance thereof is a curable irregularity. This provision already quoted by my learned brothers reads as under:

No summons or warrant shall be issued against the accused under Sub-section (I) until a list of the prosecution witnesses has been filed.' It is argued that these provisions are mandatory and no process can be issued without the list of the prosecution witnesses having been filed and further if any proceedings are taken without the list being filed, all those proceedings subsequent to the stage of issue of process are illegal. This provision is compared with provisions contained in Sees. 195, 196, 196-A. 197, 198 and 199 of the Code of Criminal Procedure, which say that 'no Court shall take cognizance of' the offence specified in these various sections unless something or other as prescribed in the Sections is done... In such cases the Court has no jurisdiction at all to entertain a complaint or proceed with it because by taking cognizance the Court applies its mind to the contents of the petition and further does so for the purpose of proceeding in a particular way for instance under Section 200 or 202 of the Code of Cr. P. See R. R. Chart v. State of U.P. reported as : 1951 CriLJ775 . The language of Section 204 (1-A) is not so prohibitive or even so strong. All that it forbids is the issue of a summons or warrant against the accused until the list of the prosecution witnesses has been filed. Therefore all that it forbids is the issue of a summons or a warrant against the accused. We can imagine cases in which a Magistrate seized of a criminal case makes up his mind to summon the accused under a particular Section of the Penal Code or any other penal enactment; but before the summons or a warrant is issued or ordered to be issued, the accused appears. In that case the Magistrate has to go on with the proceedings of the case, whether it be a

summons case or a warrant case, or a commitment proceeding. For this purpose reference may be made to Sections 207-A, 242 and 251-A of the Code of Criminal Procedure. Section 207-A (3) says:

At the commencement of the inquiry, the Magistrate shall, when the accused appears or is brought before him, satisfy himself that the documents referred to in Section 173...Sub-section (4) of the same section lays down the procedure for taking evidence. Then the subsequent sub-sections deal with the procedure to be followed by the Magistrate. Similarly Section 242, which occurs under Chapter XX. deals with the trial of summons cases. The same words are used namely 'when the accused appears or is brought before the Magistrate....

Then the following sections of the said Chapter lay down the procedure for the trial of the summons cases. Again in Section 251-A the words are 'when in any case instituted on a police report, accused appears or is brought before a Magistrate at the commencement of the trial, such Magistrate shall satisfy himself...' then this Chapter deals with the procedure to be followed in warrant cases. All these sections indicate that it is not necessary that the accused must appear before the Court after a summons or a warrant has been issued against him. When a case disclosing the commission of an offence is instituted before a competent Court, the accused can appear and take part in the proceedings and defend himself without the issue of a summons or a warrant against him. In (1902) ILR 26 Bom 552 it has been held that: 'The summons is merely the means of procuring the attendance of the accused, but if he appears of his own accord without a summons, he is entitled to require that the complaint shall either be proceeded with or dismissed.

Similarly in AIR 1919 Lah. 389 it has been held that:

Where on a case being called, the accused present themselves before the Magistrate, there is no necessity of issuing process to them under Section 204 and mere omission to issue process in such case does not render the commitment of the accused to the Court of Session illegal.

In such cases when the accused appears of his own accord to participate in the criminal case brought against him. the question of issuing a summons or a warrant

does not at all arise, Therefore there is no question of subsequent proceedings being illegal or invalid.

15-A. This provision along with so many others is a provision relating to procedure. It has been laid down by the Supreme Court more than once that irregularities relating to procedure, unless they go to the very root of the case, can be cured Under Section 537 of the Cr. P. C. My learned brother Mufti J. has quoted in extenso the observations of the Hon'ble Supreme Court in : 1956 CriLJ291 . Their Lordships in paragraph 6 have laid down that:

The Code is a Code of Procedure and like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well established and well understood lines that accord with our notions of natural justice.

If he does, if he is tried by a competent Court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking is the basic principle on which the Code is based.

Then in paragraph 43 their Lordships have further laid down that:

In adjudging the question of prejudice the fact that the absence of a charge, or a substantial mistake in it, is a serious lacuna which will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was, or was reasonably likely to have been misled in the circumstances of any particular case, he is as much entitled to the benefit of it here as elsewhere; but if, on a careful consideration of all the facts, prejudice or a reasonable and substantial likelihood of it, is not disclosed the conviction must stand : also it will always be material to consider whether objection to the nature of

the charge, or a total want of one, was taken at an early stage.

If it was not. and particularly where the accused is defended by counsel it may in a given case be proper to conclude that the accused was satisfied and knew just what he was being tried for and knew what was being alleged against him and wanted further particulars provided it is always borne in mind that 'no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused'.

In paragraph 13 their Lordships have also held that:

In our opinion, the key to the problem lies in the words underlined (herein ' '). Except where there is something' so vital as to cut at the root of jurisdiction or so abhorrent to what one might term natural justice, the matter resolves itself to a question of prejudice. Some violations of the Code will be so obvious as, for example, a refusal to give the accused a hearing, a refusal to allow him to defend himself, a refusal to explain the nature of the charge to him and so forth.

These go to the foundations of natural justice and would be struck down as illegal forthwith. It hardly matters whether this is because prejudice is then patent or because it is so abhorrent to well-established notions of natural justice that a trial of that kind is only a mockery of a trial not of the kind envisaged by the laws of our land, because either way they would be struck down at once.

Other violations will not be so obvious and it may be possible to show that having regard to all that occurred no prejudice was occasioned or that there was no reasonable probability of prejudice. In still another class of cases, the matter may be so near the border line that very slight evidence of a reasonable possibility of prejudice would swing the balance in favour of the accused.

The object of these provisions of law as remarked by both my learned brothers is to apprise the accused of the persons who are likely to give evidence against him so that he may be in a position to cross-examine them effectively after finding out as to why they are deposing against him and to guard against any possible attempt at fabricating evidence. If the list of witnesses is supplied to the accused,

not being made a part of the complaint, but before a reasonable time of recording the evidence of prosecution witness against him. in my opinion the object of this provision of law and the ends of justice would be fully met within this particular case one can safely say that the lack of supplying the list of prosecution witnesses with the initial complaint has caused no prejudice to the accused as has been fully brought out by my learned brother Mufti J. He was all along represented by a counsel, the list was supplied to him before the prosecution evidence was actually recorded and no objection was taken about this irregularity till the case was committed to the Court of Session. Apart from the facts of this particular case I have no hesitation in stating that if the list of the prosecution witnesses is supplied to the accused before the prosecution evidence actually starts and he has time to know about the names of the prospective witnesses against him. no prejudice can be said to have been caused to the accused and further in my opinion the proceedings taken in the case shall not be invalid simply because the list did not accompany or was not made a part of the original complaint.

16. Now let me examine this aspect of the case from a different point of view. There are similar provisions in the amended Code of Criminal Procedure; for instance under this very Section 204 (I-B) it is laid down that in a proceeding instituted upon a complaint made in writing, every summons or warrant issued under Sub-section (1) shall be accompanied by a copy of such complaint. Similarly under Section 173 (4) the Police Officer-in-charge of the police station has to, before the commencement of the inquiry or trial, furnish to the accused, free of cost, a copy of the FIR and all other documents or relevant extracts thereof on which the prosecution proposes to rely and the statements and confession recorded of all the persons whom the prosecution proposes to examine unless they are irrelevant (Sub-section 5). There is no dearth of authorities on the proposition that if a copy of the complaint does not accompany the summons or warrant issued against an accused person or if he is not supplied the copies of the record as laid down in Section 173 (4) the proceedings shall not be vitiated. Reference may be made to : 1957 CriLJ1320 in which case their Lordships held that the provisions of Sections 173 (4) and 207A (3) of the Code of Cr. P. have been introduced by the amending Act of 1955 in order to simplify the procedure in respect of inquiries leading upto a Sessions trial Similarly in another authority

reported as : 1964 CriLJ167 it has been held that:

The object of Sections 162, 173 (4) and 207A (3) is to enable the accused to obtain a clear picture of the case against Mm before the commencement of the inquiry. The sections impose an obligation upon the investigation officer to supply before the commencement of the inquiry copies of the statements of witnesses who are intended to be examined at the trial so that the accused may utilize those statements for cross-examining the witnesses to establish such defence as he desires to put up and also to shake their testimony. Section 161 (3) does not require a police-officer to record in writing the statements of witnesses examined by him in the course of investigation, but if he does record in writing any such statements, he is obliged to make copies of these statements available to the accused before the commencement of proceedings in the Court so that the accused may know the details and particulars of the case against him and how the case is intended to be proved. The object of the provision is manifestly to give the accused the fullest information in the possession of the prosecution on which the case of the State is based, and the statements made against him. But failure to furnish statements of witnesses recorded in the course of investigation may not vitiate the trial. It does not affect the jurisdiction of the Court to try a case, nor is the failure by itself a ground which affects the powers of the Court to record a conviction, if the evidence warrants such a course. The provision relating to the making of copies of statements recorded in the course of investigation is undoubtedly of great importance but the breach thereof must be considered in the light of the prejudice caused to the accused by reason of its breach.

If similar provisions in the Code of Criminal Procedure have been held to be only directory non-compliance of which Would not make the trial illegal. I fail to understand how failure to comply with the provisions of Section 204 (I-A) would render the trial illegal. It has been however held by various Courts that the provisions of Sub-section (1-B) of Section 204 are simply directory. Even Chitaley in AIR Commentaries of the Code of Criminal Procedure (6th Edition) Vol I at page 1431 says 'It, is not clear why there should be this difference between the two provisions as regards the question whether they are mandatory or directory, seeing that the object of both the provisions is similar namely, to apprise the

accused of the nature of the charge against him in the one case and of the persons who are relied upon to give evidence in support of the charges. In either case it seems that the original non-compliance can be cured by a substantial compliance with the provisions.

17. It is laid down by almost all the Courts that the initial list supplied by the complainant with his complaint can be added to. In this behalf the following authorities may be mentioned. : AIR1960 Ori178 AIR 1958 Mad 341, and even additional documents other than those supplied to the accused initially can be produced in a Court. See . The solitary Judge who has taken a contrary view is Raju J of the Bombay High Court who was later on transferred to the Gujarat High Court. That learned Judge has said in a case reported as AIR 1960 Bom 513 that in cases instituted otherwise on a police report the complainant is restricted to the examination of witnesses whose names are given in the list under Section 204 (IA). But even this Learned Judge says that in a proper case the list of the witnesses can be added to with the permission of the Court. If a list of witnesses as supplied by the complainant along with his complaint can be added to afterwards, may be with the permission of the Court, I do not find any logic in laying down that if the complaint is not accompanied with the list of witnesses, the proceedings become invalid after the stage of issue of process. For all practical purposes, whether list of witnesses was not initially supplied or was sought to be later on added to or amplified the law should have been and should be the same, If the section has been interpreted as permitting the, Magistrate to allow the complainant to give a further list of prosecution witnesses then those mentioned in or with the original complaint, there is no reason to hold that his initial failure to mention the names of the witnesses at the time of the complaint, would render the proceedings invalid.

18. There is yet another approach to the matter. Section 252 (2) lays down:

The Magistrate shall ascertain from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the cases and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

This sub-section according to the ordinary rules of interpretation of statutes has to be read harmoniously with Section 204 (I-A) or in other words an attempt has to be made to reconcile the provisions of these two sub-sections. Even after the amendment of Section 204 this sub-section was retained by the legislature, Sub-section (2) of Section 252 comes into play at a stage subsequent to issue of process. Under this provision the Magistrate is bound to enquire from the complainant or otherwise ascertain the names of the persons' likely to be acquainted with the facts of the case or in other words-to be able to give evidence i. e. who could be the prosecution witnesses and he is then bound to summon such of them as he thinks necessary for the decision of the case. This can be done by the Magistrate at any stage of the case at least upto the close of the prosecution evidence. In such cases when the list of the prosecution witnesses can be added to even during or at the close of the prosecution evidence, it would hardly stand to logic that if the list of witnesses were not originally appended with the complaint, the proceedings from the stage of issue of process should become invalid and should be held to be illegal. Reference may be made to : AIR1960 All394 and : AIR1960 All443 .

19. In : AIR1960 All394 it has been held that:

The power of a Magistrate to summon witnesses in summons cases is fully and exhaustively laid down in Section 244-The power is wide enough to include issuing summonses against witnesses other than those mentioned in the list prepared under Section 204A also. The Magistrate is bound to hear all the witnesses produced by the complainant in support of the prosecution, Section 204 (LA) only imposes a condition on the issue of a summons against the accused and once a summons is issued it ceases to be of any relevancy and does not govern the subsequent procedure.

Similarly in : AIR1960 All443 it is held that:

If the name of any material witness was not entered in the list of witnesses submitted Under Section 204 (IA) and the Magistrate is satisfied that the examination of that person is necessary in the interest of justice, that witness can be summoned and examined though of course the complainant should ordinarily

give out the name of his witnesses before his evidence or that of his witnesses is recorded.

In : AIR1968 Cal266 it has been held that:

There is no inflexible rule provided for under the Code that a list of witnesses must have to be incorporated in the petition of complaint or must accompany the petition of complaint and a failure to do that will vitiate the proceedings. The intention of the legislature is quite clear and is that before the issuing of the summons or warrant against the accused persons, such a list of witnesses should be filed.

So from this point of view also I venture to think that the provisions of Section 204 (IA) of the Code of Cri Procedure are only directory and any disregard of this will not result in the vitiation of the trial but such an irregularity is curable under Section 537 of the Code of Cr. Procedure, My learned brother Jaswant Singh J. has relied on a judgment of Dua J reported in . The learned Judge in that judgment held that Clauses (IA) and (IB) of Section 204 are enacted in the interest and for the protection of the accused; but so far as Clause (IB) is concerned, he holds it simply to be directory, and still holds Clause (IA) as mandatory and the reason given is that this clause is couched in a negative language and it goes to the power of the Magistrate to issue summons or warrants, as the case may be. The provisions which enjoin the Courts to satisfy themselves about the prima facie nature of the criminal charge, before issuing a process must be intended in the absence of a clear suggestion to the contrary, to be mandatory. Remarked the Hon'ble Judges of the Supreme Court in : 1956 CriLJ291 when they say the real question is not whether a matter is expressed positively or is stated in negative terms but whether disregard of a particular provision amounts to 'substantial' denial of a trial as contemplated by the Code and understood by the comprehensive expression 'natural justice.'

20. The other authority relied upon by my learned brother Jaswant Singh J. is : AIR 1958 MP28 . This a very short Judgment without reference to any authority. It simply lays down:

Having regard to the wording of Section 204. Clauses (I-A) and (I-B) it is clear that the filing of the list of prosecution witnesses is essential unless the complainant is the only witness in the case and that along with the summons or warrant issued under Sub-section (I) copy of the complaint ought to be sent to the accused ...

No reasoning has been given nor has any comment been made on the relevant law on the subject as contained in this section or other similar sections of the Code of Criminal Procedure. This authority can hardly be a guide to be followed without scrutinizing the same,

21. The result of all that I have said above, is that in my opinion the proceedings subsequent to the issue of process would not be entirely illegal or vitiated if the complaint is not accompanied by a list of prosecution witnesses unless prejudice by such non-compliance is pleaded and proved by the accused.

S. Murtaza Fazal Ali, C.J.

22. I have perused the Judgments proposed by my learned brothers Mufti Baha-ud-Din (with whom Jalal-ud-Din J has concurred), Jaswant Singh and Bhat JJ. I agree with the opinion expressed by Mufti Baha-ud-Din and Bhat JJ. in their judgments and more particularly with the persuasive reasoning given by Bhat, J. in his separate judgment. I would, however, like to add a few lines of my own on certain aspects which have not been touched by my colleagues : particularly in agreeing with my learned brothers I am taking a view different from the one which I took in the case of Haji Gulam Mohd. Burza v. Hajira Begum decided on 31-10-1969 (J. & K.) relying on the Punjab and M, P. decisions.

23. The Criminal P. C. is essentially a procedural law and therefore any error or irregularity in the mode or method of trial does not necessarily go to the jurisdiction of the court but is curable under Section 537 of the Criminal P. C. A perusal of the scheme of the Code unmistakably reveals that the statute prescribes' some provisions for the protection of the accused : some in the interest of the prosecution, some to meet the requirements of the court *ex debito justitiae* and some in public interest. It is therefore manifest that the provisions which are made in public interest cannot be ignored or waived but must be complied with the letter

and the spirit of the law because there is no estoppel against the statute. The question of waiving these provisions therefore by consent does not arise. The provisions of Sections 195 196. 196A. 197 and 198 etc. fall within this category, violation of which goes to the very root of the jurisdiction of the matter and the conditions prescribed in these sections are a sine qua non for the assumption of the jurisdiction of the court, and since these provisions are in public interest, no amount of waiver or consent can confer jurisdiction on the court which it does not possess. Further more failure to comply with these provisions results in the court suffering from an inherent lack of jurisdiction and such an illegality is not curable under Section 537 of the Code- It is now well settled by the authorities of the Supreme Court, the Privy Council and all High Courts that these provisions are mandatory and are not curable under Section 537.

24. The question for consideration, however, is whether the provisions of Section 204 (1-A) of the Criminal P. C. can be equated with these provisions so as to have a mandatory force. In order to answer this question it will be necessary to reproduce the two parts of Section 204 namely, 204(1) and 204(1-A) as follows:

Section 204 (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceedings and the case appears to be one in which, according to the fourth column of the second Schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column a warrant should issue in the first instance, he may issue a warrant or, if he thinks fit. a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has not jurisdiction himself) some other Magistrate having jurisdiction.

(1-A) No summons or warrant shall be issued against the accused under Sub-section (I) until a list of the prosecution witnesses has been filed.

25. It would appear that so far as Section 204 (I) is concerned, it confers judicial power on a Magistrate to issue summons if he is satisfied that there is sufficient ground for proceeding against the accused. So far as this provision is concerned it confers power on the Magistrate to take cognizance, no prohibition or inhibition as

mentioned in Section 204 (1-A) is laid down. Section 204 (I-A) however provides that before a summons or warrant shall be actually issued, it must be accompanied by a list of prosecution witnesses. Thus from the very language of this section it would appear that while Section 204 (I) refers to the application of the judicial mind of the Magistrate, Section 204 (1-A) refers to the actual issue of summons and the mode in which the summons should be issued. It is therefore patent that Section 204 (1-A) has only a directory effect even though it is couched in a negative form. For instance there are similar provisions under the Civil P. C. where in a suit, notice of the plaint is issued to the defendant so as to be accompanied by a copy of the plaint but it has never been contended that if the copy of the plaint does not accompany the notice the suit becomes liable to be dismissed or the proceedings are vitiated for want of jurisdiction. It seems to me therefore that Section 204(1-A) which is a salutary provision made not in public interest but only for the protection and benefit of the accused has to be complied with normally, but it is not mandatory in the sense that even if no prejudice is caused to the accused it will vitiate the trial.

26. In the instant case, as pointed out by Bhat J, the list was eventually supplied to the accused later on though not along with the summons and the accused who was defended by a counsel cross-examined the witnesses. No objection was raised by the accused at any stage that he had been prejudiced because the list was not supplied along with the summons. In these circumstances therefore I am clearly of the opinion that non-compliance of Section 204 (I-A) is an irregularity which is curable under Section 537 and does not vitiate the proceedings unless it is proved that prejudice has been caused. Where the accused makes no complaint of the non-compliance of this provision at any stage and exercise his right of cross-examining the witnesses the presumption will be that no prejudice has been caused to the accused, unless it is proved otherwise. The Punjab and M, P. decisions referred to in the judgments of my learned brothers Bhat and Mufti Baha-ud-Din JJ. appear to have taken a much too technical view of the matter and were mainly influenced by the fact that Section 204 (1A) is couched in a negative language which as pointed out by the Supreme Court in : 1956 CriLJ291 is not the main criterion to determine whether the provision is mandatory or directory. Comparing the language of Section 204 (I-A) with the provisions of Section 195

etc. it would appear that while in the former section there is a clear prohibition against taking of the cognizance of the case, the provisions contained in Section 204 (I-A) can only apply after a judicial order is passed under Section 204 (1-A) and therefore in no sense can Section 204 (I-A) be equated with the provisions of Sections 195, 196, 196A. 197 and 198 of the Criminal P. C.

27. When I decided the case Ghulam Mohd. Burza v. Hajira Begum D/- 31-10-1969 (J. & K.) (Supra), the aspects mentioned above were not brought to my notice, nor was the decision of the Supreme Court (supra) cited before me. However considering the matter from all aspects, I feel myself in complete agreement with the opinions expressed by Bhat and Mufti Baha-ud-Din JJ.

28. I, therefore, hold that there is no force in this revision petition which should be dismissed.

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