

Raj Kumar Vs. State

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Court : Jammu and Kashmir

Decided On : Sep-12-2006

Reported in : 2007CriLJ2348

Judge : Y.P. Nargogra, J.

Appellant : Raj Kumar

Respondent : State

Advocate for Pet/Ap. : Mr. Dubey

Disposition : Petition dismissed

Judgement :

ORDER

Y.P. Nargogra, J.

1. A charge-sheet for commission of the offence under Section 13 of J. & K. Public Gambling Act came to be filed against five accused persons. The petitioner was one of them. On being called upon to plead by the learned trial Court, the petitioner/accused' pleaded guilty. The statement of accused/petitioner for recording the plea of guilt was, recorded by the learned trial Court. Accepting the plea of guilt, the learned trial Court, vide its order dated 8-12-2003 imposed a punishment of fine of Rs. 300/- each upon all the accused including the petitioner.

All the accused including the petitioner paid the fine and thus suffered the sentence. The accused/petitioner, however, challenged the order of his conviction and sentence in a revision petition before the learned 2nd Addl. Sessions Judge, Jammu. The learned Sessions Judge vide his order dated 30-4-2004 dismissed the revision petition filed by the petitioner and confirmed the sentence. Being not satisfied with the order of learned Sessions Judge, the petitioner/accused has filed this petition for invoking Section 561-A Cr.P.C. The accused/petitioner prays that the order of trial Court dated 8-12-2003 and order of learned Sessions Judge dated 30-4-2004 be quashed.

2. I have heard learned Counsel for petitioner.

3. The contention of Mr. Dubey, learned Counsel for petitioner is that since the statement of accused for recording the plea of guilt has not been recorded by the trial Court in conformity with Section 364 Cr. P.C. therefore, conviction of accused and sentence imposed are vitiated and bad in law. According to the learned Counsel the said order should be set aside and the accused should be acquitted of the charge. Section 364 of Cr.P.C. reads as follows:

364. Examination of accused how recorded.-- (1) Whenever the accused is examined by any Magistrate, or by any Court, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or if that is not practicable, in the language of Court or in English; and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him, in a language which he understands, and he shall be at liberty to explain or add to his answers.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the language of the court, or in English, if he is sufficiently acquainted with latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under Section 263.

4. Mr. Dubey contends that Sub-section (2) of Section 364 requires that after recording the statement of accused and the same being signed by him and the Magistrate, the Magistrate was required to certify under his own hand that the examination was taken in his presence and hearing and that the record contains a full and true account of the statement made by the accused.

5. From the perusal of statement recorded, it transpires that the learned Magistrate for recording the certificate as envisaged by Sub-section (2) of Section 364 used a seal therefor. It is the contention of Mr. Dubey that the Magistrate ought to have recorded certificate in his own hand and should not have used the seal. According to him, the using of seal makes the certificate invalid in the eyes of law. In support of his contention he relies upon a case, entitled, State v. Miya Jani AIR 1961 Mysore 158, the relevant portion reads as under:

All that is found at the end of the statement is 'Explained over in Urdu and admitted.' The Magistrate or Judge has to certify under his own hand that the examination was made in his presence and hearing and that the record contains a full and true account of the statement made by the accused. This is not a mere formality as it is intended to safeguard the interests of the accused whenever he is examined by any Magistrate or by any subordinate Court. The omission to make the prescribed certificate is a serious infirmity.

6. Mr. Dubey also relies upon a case, entitled, Mohd. Ramzan v. State 1981 KLJ 324 : 1981 Cri LJ 1212. In the said case, the Magistrate had recorded the

certificate in terms of Section 364 by using a seal. Similar contention was raised that the certificate was not in accordance with Section 364 Cr.P.C., therefore, vitiated the trial. This Court held:

The expression that the certificate should be written by the Magistrate in his own hand would not necessarily under all the circumstances come to be interpreted to mean that the whole certificate should be written by the magistrate with his own pen. The requirements of law may be met in case the magistrate affixed the seal containing the contents referred to in Sub-clause (3) and also signed the same. The object was to ascertain whether the Magistrate was conscious of what he was doing. It could be shown that the affixation of the seal of certificate was a process automatically undertaken by the Magistrate without applying their mind, that may, make a difference and strict interpretation may have to be given to the expression in his own hand' used in the said sub-section. This was especially so where the Magistrate records a plea of guilt. In such cases strict compliance with the requirements may not only be desirable but necessary as it would beyond reasonable doubt manifestly show that the Magistrate in fact applied his mind while writing the requisite certificate. In the instant case where a plea of guilt has been recorded, the Magistrate should have been alerted and examined the petitioner-accused himself and recorded the certificate in his own hand. The circumstances demanded strict compliance. In any case, the Magistrates would be better advised to give up to affix such type of seals that are bound to give rise to doubts with regards their proper application of mind. Under the circumstances, it is held that the requirements enumerated in Sub-clause (3) of Section 364 were not fully met by affixation of the seal beneath the statement of the accused petitioner in reply to the question put to him after the charge was framed against him.

7. This Court in the above case held that the certificate in terms of Sub-section (2) of Section 364 should be recorded by the Magistrate in his own hand, but the question remains whether recording the certificate in terms of Sub-section (2) of Section 364 of accused by using the seal per se vitiates the trial. In my considered opinion, it does not vitiate the trial as it cannot by itself cause any prejudice to the accused. It is mere irregularity curable in terms of Section 533 Cr.P.C. which provides as follows:

533. Non-compliance with provisions of Section 164 or 364.- (1) If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under Section 164 or Section 364 is tendered or has been received in evidence, finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in the Evidence Act, 1977, Section 91. such statement shall be admitted If the error has not injured the accused as to his defence on the merits.

(2) The provisions of this section apply to Courts of appeal, reference and revision.

8. I am fortified in my view by the judgment of Mysore High Court rendered in *State of Mysore v. Narsappa* AIR 1967 Mysore 214, in which it was held:

Although non-certification by the Magistrate or the Presiding Officer of the statement made by the accused under Section 342 of the Code of Criminal Procedure may amount to an illegality, nevertheless it does not ipso facto vitiate the trial. Now it is a well settled law that even an omission to frame a charge would not vitiate the trial, unless prejudice has thereby been occasioned to the accused. It is also well settled that if an objection to that effect had not been taken at the initial stage subsequently at the stage of appeal or revision, unless the petitioner satisfies the Court on facts that prejudice has been occasioned, such an omission cannot have the effect of vitiating the proceeding.

It was further held:

Hence in the absence of any objection taken by the accused either in the trial Court or before the Sessions Judge to the effect that any prejudice had been thereby occasioned to the accused persons, the non-certification of the statement of accused by the Magistrate could not have any material effect against the prosecution.

9. The present case is not the one where certificate has not been recorded at all. It stands at a better footing than the case which was before the High Court of

Mysore. The error in using the seal does not go to the root of the case and does not in any manner vitiate the trial. The contention of learned Counsel in this view of legal position is without any merit.

10. Mr. Dubey, learned Counsel for petitioner next contends that while recording the statement of accused no opportunity of being heard was granted to him. This plea is also without any merit. Once the statement of accused was being recorded and, in fact, has been recorded that itself indicates that the accused was heard in the matter while being called upon to plead, on which he pleaded the guilt.

11. It is also contended by Mr. Dubey that the statement of accused has not been recorded correctly by the learned trial Court. According to him, in terms of Section 242 the learned trial Court was required to enquire from the accused to show cause as to why he should not be convicted. In my considered opinion in the present case, there is no non-compliance of Section 242 Cr.P.C. Once the accused is asked 'kya apne zuram kiya hai', it also in itself includes the question as to why he should not be convicted. This question in itself entitles the accused to show in answer that as to why he should not be convicted.

12. Mr. Dubey, learned Counsel for petitioner also contends that the accused had not made the said statement forming the plea of guilt before the trial Court, but the learned trial Court had obtained his signatures upon a blank paper. Such a plea cannot be allowed to be taken. It is the presumption of law that all acts which are required to be done in accordance with law, are done by following the procedure prescribed by law unless it is otherwise shown. There is no material placed on record by the petitioner to show that he had not made such statement. After having appended his signatures on the statement, he cannot retract therefrom.

13. In view of the above, there is no merit in the petition. It is as such dismissed.