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EMPEROR v. BENI

For the reasons given above I allow this application, set aside the conviction and the sentence and direct that the fine, if paid, be refunded.

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Ganga Nath

EMPEROR *v.* SIA RAM AND OTHERS*

1934
October, 26

Criminal Procedure Code, sections 263, 342, 364, 537—Summary trial—Summons case—Omission to examine the accused and record his statement—Defect curable where accused not prejudiced.

Section 342 of the Criminal Procedure Code, relating to the examination of the accused after the examination of the prosecution witnesses, applies to summons cases as well as to warrant cases; it also applies to summary trials. But the recording of the whole of the examination of the accused in the form of questions and answers, which section 364 prescribes for warrant cases and summons cases, is expressly dispensed with in the case of summary trials. The words "if any" in clause (*g*) of section 263 do not imply that it is optional to the Magistrate in a summary trial to examine the accused or not, but merely imply that where the accused has made a statement, particulars of his statement should be noted; but that is not the same thing as recording his examination in full. The mere fact, therefore, that no other statement of the accused, beyond the plea of not guilty, has been recorded by the Magistrate in a summary trial would not show that the accused was never questioned at all.

The defect of non-compliance with the provisions of section 342 is a mere irregularity and is cured by the provisions of section 537 of the Criminal Procedure Code unless the accused has been prejudiced thereby.

This case was referred to a Division Bench, with the following referring order:

COLLISTER, J.:—This is a reference by the Sessions Judge at Bulandshahr under section 438 of the Criminal Procedure Code. Certain persons were tried for an offence under sections 426 and 352 of the Indian Penal Code and were convicted on the 4th April, 1934; and on the same date they were tried and convicted of an offence under section 379 of the Indian

*Criminal Reference No. 622 of 1934.

Penal Code. The case under sections 426 and 352 was a summons case and that under section 379 was a warrant case. Both were tried summarily by the Magistrate. The main point for determination is whether the provisions of section 342 of the Criminal Procedure Code apply to the summary trial of (1) warrant cases and (2) summons cases and whether it is mandatory for the court to examine the accused when the evidence for the prosecution is closed and to record the statement so given by the accused. As regards the two cases which are now before me, against heading no. 8, i.e., "Plea of accused and his examination (if any)", the Magistrate has merely recorded the words "Accused all plead not guilty" in the case under section 379, while in the case under sections 426 and 352 he has recorded a few lines embodying the substance of the defence. Admittedly this was done before the evidence was gone into; and there is nothing on the record to show that the accused were also examined under section 342 after the witnesses for the prosecution had been examined. There is no direct authority of this Court on the subject, but there is a conflict of opinion between the Madras High Court and the other High Courts. As regards the summary trial of warrant cases, it has been held in *Mahomed Hossain* v. *Emperor* (1), *Balkesar Singh* v. *King-Emperor* (2) and *Parsotim Das* v. *King-Emperor* (3), that section 263 of the Criminal Procedure Code is governed by section 342 and there must therefore be an examination of the accused in the trial of all warrant cases, whether summary or otherwise. In *Emperor* v. *Fernandez* (4) and *Bechu Lal* v. *Emperor* (5) it has been held that section 342 is applicable in the regular trial of summons cases; and in *Moyz-uddin Mean* v. *King-Emperor* (6), *Parmeshwal Lal Mitter* v. *King-Emperor* (7), *Bhagwan* v. *Emperor* (8) and *Emperor* v. *Nabu* (9), the view has been taken that compliance with section 342 is obligatory in the summary trial of summons cases as well as in the summary trial of warrant cases. On the other hand, a Full Bench of five Judges of the Madras High Court in *Ponnusamy Odayar* v. *Ramasamy Thathan* (10) was of opinion that section 342 is not applicable to the regular trial of summons cases and the same Bench in *Dharma Singh* v. *King-Emperor* (11), at page 766 of the same volume, held

(1) (1914) I.L.R., 41 Cal., 713.
(2) A.I.R., 1922 Pat., 5.
(3) (1927) I.L.R., 6 Pat., 504.
(4) (1920) I.L.R., 45 Bom., 672.
(5) (1926) I.L.R., 54 Cal., 286.
(6) (1929) 33 C.W.N., 947.
(7) A.I.R., 1922 Pat., 296.
(8) A.I.R., 1926 Nag., 300.
(9) A.I.R., 1926 Sind., 1.
(10) (1923) I.L.R., 46 Mad., 758.
(11) (1923) I.L.R., 46 Mad., 766.

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à fortiori that there is no need to examine the accused under section 342 of the Criminal Procedure Code in a summary trial of a summons case.

The point is of some importance and since there does not appear to be any direct authority of this Court on the subject, I think that this reference should be heard by a Bench.

If it be held that section 342 is mandatory and must be complied with by the court at a summary trial of (1) a warrant case or (2) a summons case, or both, a question which may arise will be whether non-compliance with that section will invalidate the trial absolutely or whether the trial will only be invalidated in the event of the court finding that the accused has been prejudiced.

I direct that this reference be heard by a Division Bench.

The case was then laid before and heard by a Division Bench.

Mr. *S. N. Seth*, for the applicant.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

SULAIMAN, C.J., and GANGA NATH, J.:—This is a reference by the Sessions Judge of Bulandshahr against an order of a Magistrate convicting the accused under section 379 of the Indian Penal Code and sentencing them to a fine of Rs.50 each. So far as this case is concerned the note made by the Magistrate under the heading "Plea of accused and his examination, if any", was "Accused all plead not guilty". There were no further particulars of any statement that the accused might have made. The learned Sessions Judge has therefore inferred that the accused were not at all questioned generally as is required by section 342 of the Criminal Procedure Code. The learned Sessions Judge came to the conclusion that non-compliance with section 342 of the Criminal Procedure Code, which was applicable to the summary trial, was a fatal defect.

There has been some difference of opinion as to whether the latter provision of section 342(1) applied to summons cases just as it applied to warrant cases. With the exception of the Madras and Rangoon High Courts it appears that all the other High Courts, namely, of

Calcutta, Bombay, Lahore and Patna as well as Allahabad, have been of the opinion that section 342 applies to summons cases just as well as to warrant cases. The contention that the words "Before he is called on for his defence" occurring in section 342 do not occur in sections 242, 243, 244 and 245 of chapter XX does not appear to have much force because the exact words have not been repeated even in section 289 though the words used therein are somewhat similar. No doubt there is provision in chapter XX for questioning and examining the accused, but that does not imply that section 342 is wholly inapplicable. The last mentioned section occurs in chapter XXIV which has the heading "General provisions as to inquiries and trials". There is therefore no reason to presume that the provisions in this chapter are inapplicable to summons cases. Section 364 provides that when an accused is examined, the whole of his examination including every question put to him and every answer given by him shall be recorded in full. But sub-section (4) of that section lays down that nothing in this section shall be deemed to apply to the examination of an accused person under section 263 which applies to a summary trial. It is therefore obvious that even in the case of a summary trial, and much more so in a summons case, the examination of an accused is necessary, although the recording of the whole of such examination is dispensed with in the case of a summary trial.

It may well be that there is much to be said in support of either view, but the preponderance of opinion has been in favour of the view that section 342 applies both to summons and warrant cases. In the case of *Khacho Mal* v. *Emperor* (1) DANIELS, J., held that section 342 has always been held to be applicable to summons cases as well as to warrant cases, and the learned Judge applied the provisions of that section to the summons case out of which the reference before him had arisen. There are

(1) A.I.R., 1926 All., 358.

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several other cases in which the same opinion has been expressed but they may be distinguished on the ground that they refer to warrant cases. See: *Emperor* v. *Bechu Chaube* (1), *Murat Singh* v. *Emperor* (2), *Emperor* v. *Jhabbar Mal* (3).

As it is only fair to an accused person that he should be questioned generally on the case for the purpose of enabling him to explain any circumstances appearing in the prosecution evidence against him, it is reasonable to hold that section 342 applies to all cases.

Section 244 merely requires that the Magistrate should hear an accused and take all such evidence as he produces in his defence; and so hearing the accused may not be exactly questioning him generally on the case in order to enable him to explain any circumstances appearing against him. In this view of the matter we are of opinion that the view expressed in this Court should not be departed from when it is supported by the opinions expressed in so many other High Courts. We accordingly hold that the provisions of section 342 apply to summons cases as well.

The position as regards summary trials is in our opinion simpler. Section 342 does not itself require that the answers given by the accused to the questions put to him should be reduced to writing. But for warrant and summons cases section 364 requires that the whole of the examination of an accused person should be so recorded in the form of questions and answers. As already pointed out this recording of the statement is expressly dispensed with in the case of summary trials. It would, therefore, follow that the mere fact that the statement of the accused has not been recorded by the Magistrate in a summary trial would not show either that the accused was never questioned at all or that the omission to record his statement is fatal.

The procedure prescribed for summons cases applies under section 262 to summary trials as well. Section

(1) (1922) I.L.R., 45 All., 124. (2) (1927) 26 A.L.J., 109.
(3) (1927) 26 A.L.J., 196.

263 which applies to summary trials requires that the Magistrate shall enter certain particulars including the plea of the accused and his examination (if any). It therefore follows that it is the duty of the Magistrate to record not only the plea of the accused but also his examination, if any. The words "if any" do not imply that it is optional to the Magistrate to examine the accused or not, but merely imply that where the accused has made a statement, particulars of his examination should be noted. But that is not the same thing as recording his examination in full.

In this particular case, we cannot in the first place be absolutely certain that the accused were never questioned at all, particularly as we find that in the connected case which was decided on the same date an abstract of their statements was actually recorded, but the fact remains that particulars of the examination, if any had taken place, were not recorded by the Magistrate but only the plea of not guilty was noted. But such a defect is at the most a mere irregularity which can be cured under section 537 of the Criminal Procedure Code unless the defect has in fact occasioned a failure of justice.

It has been held in the cases decided by this Court, quoted above, that the defect of non-compliance with the provisions of section 342 is a mere irregularity which is not fatal to the trial unless the accused has been prejudiced.

In the case before us the question was whether the accused had cut down certain trees belonging to the complainant who was the zamindar. After the complainant's evidence had been closed the accused, after pleading that they were not guilty, produced evidence to show that the trees had not been cut down by the accused but were actually cut down by the zamindar himself. This evidence has not been believed. There was no suggestion in the cross-examination of the witnesses for the prosecution nor in the defence evidence that the trees belonged to the accused themselves or even

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to any other party. The learned Magistrate expressly noted in his judgment that it was not contested on behalf of the accused that the trees belonged to the zamindar. We are therefore unable to agree with the learned Sessions Judge that there was a possibility of the accused denying the ownership of the trees if they had been specifically questioned about the matter. We must, therefore, hold that the accused have in no way been prejudiced by either the omission to question them generally on the case after the prosecution evidence had been closed or by the omission to record the particulars of their examination.

The learned Sessions Judge is clearly wrong in thinking that a sentence of fine only was illegal. We, however, agree with him that the sentence of fine of Rs.50 on each of the four accused for the offence of cutting down two babul trees worth Rs.10 is rather severe. We accordingly accept this reference in part and upholding the convictions of all the accused reduce the fines imposed upon them to Rs.15 each; in default of payment of the fines they will undergo two weeks' rigorous imprisonment each. Out of the total amount so realised Rs.10 will be paid to the complainant as compensation.

PRIVY COUNCIL

J. C.* 1935 *July*, 15

LAKSHMI CHAND (PLAINTIFF) *v.* ANANDI (DEFENDANT)

[On appeal from the High Court at Allahabad]

Hindu law—Widow—Estate specially created by agreement between coparceners—Liability to forfeiture by unchastity.

By a document executed by two undivided brothers it was agreed that on the death of either, his widow should receive a moiety of the profits of the joint family estate.

Held that under the agreement the widow took a special estate created for her, different from the right to maintenance, and this estate would not be liable to divestment by subsequent unchastity.

Judgment of the High Court affirmed.

*Present: Lord THANKERTON, Lord WRIGHT and Sir SHADI LAL.