

## APPELLATE CRIMINAL.

1930  
Septem-  
ber, 18.

Before Mr. Justice Muhammad Raza and Mr. Justice  
Bisheshwar Nath Srivastava.

RAM LAUTAN (APPELLANT) v. KING-EMPEROR (COM-  
PLAINANT-RESPONDENT).\*

*Criminal Procedure Code (Act V of 1898) as amended by Act of 1923, section 339 (proviso)—Approver—Accused tendered pardon and examined as approver—Committal of approver to sessions along with other co-accused, legality of—Failure to administer oath to approver, effect of—Criminal trial—Error or illegality in the trial of a criminal case, which vitiates the whole trial—Plea not raised in lower court or in the memorandum of appeal, whether can be allowed to be raised in appellate court.*

Held, that an appellant must be allowed to raise a plea that the whole trial is vitiated by an alleged illegality or error in the trial of a case in the lower court although such a plea was not raised specifically in the lower courts and has not been raised in the memorandum of appeal. It may be that the counsel who appeared for the accused in the lower courts took no objection to the defect in the mode of conducting the trial or, even that there was a waiver or consent on his part; but 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. *V. M. Abdul Rahman v. The King-Emperor (1)*, and *The Queen v. Bholanath Sein (2)*, and *Puran v. Emperor (3)*, referred to.

Where a certain person was treated as a confessing accused and conditional pardon was granted to him under section 337 of the Code of Criminal Procedure and he was examined as an approver the fact that no oath was administered to him did not establish that the Committing Magistrate did not examine or did not mean to examine him as an approver and the committal of such an accused for trial to the court of sessions along with other co-accused was illegal under the proviso to section 339 of the Code of Criminal

\*Criminal Appeal No. 355 of 1930, against the order of Fandit Raghubar Dayal Shukla, Sessions Judge of Rae Bareilly at Partabgarh, dated the 12th of August, 1930.

(1) (1926) 25 A.L.J., 117 (121) (P. C.) (2) (1876) 25 W.R., 57 (60.) (3) (1903) 6 O.C., 192 (194.)

Procedure as amended by the Act of 1923. The error was not a mere formal defect of procedure, but was a substantial error of law which vitiated the whole trial.

Messrs. *St. George Jackson* and *Satyanand Roy*, for the appellant.

The Government Advocate (Mr. *H. K. Ghosh*), for the Crown.

RAZA and SRIVASTAVA, JJ.:—Four persons, namely, Salik Ram, Dattu, Rameshwar and Jaigobind, have been convicted by the learned Sessions Judge of Rae Bareilly of an offence of murder under section 302 of the Indian Penal Code and sentenced to death subject to confirmation of this Court. They appeal. The reference in confirmation is also before us. The fifth man, Ram Lotan, has been convicted by the learned Sessions Judge under section 201 of the Indian Penal Code and sentenced to five years' rigorous imprisonment. He appears to be a cousin of Salik Ram accused. It has been found against him that he caused disappearance of the evidence of murder. He also has appealed to this Court along with the others named above.

A preliminary objection to the trial of this case has been raised before us, in the course of arguments, by the appellants' learned counsel, Mr. *Jackson*. He contends that the error or illegality complained of has vitiated the whole trial. We thought it proper to hear the learned counsel on both sides on that point, before disposing of these appeals on the merits. If Mr. *Jackson's* contention is accepted, then the appeals cannot be heard on the merits as the appellants must be re-tried. The learned Government Advocate has contended before us that the plea which has been raised in this Court was not raised in the lower courts, and that it has been raised too late. It is true that the plea which has now been raised by Mr. *Jackson* in

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this Court was not raised specifically in the lower courts and has not been raised in the memorandum of appeal; but the appellants must be allowed to raise the plea, when it is contended that the whole trial is vitiated by the alleged illegality or error in the trial of the case in the lower court. It may be that the counsel who appeared for the accused in the lower courts took no objection to the defect in the mode of conducting the trial or, even that there was a waiver or consent on his part; but 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—See *V. M. Abdul Rahman v. The King-Emperor* (1). If criminal proceedings are substantially bad in themselves, the defect will not be cured by any waiver or consent of the prisoner himself—See *The Queen v. Bholanath Sein* (2) referred to in *Puran v. Emperor* (3). Now we proceed to consider the objection taken by the appellants' learned counsel. Two persons, namely Rameshwar and Dattu, were treated as confessing accused in this case. They retracted their confessions before the Committing Magistrate eventually. The confession of Dattu was recorded under section 164 of the Code of Criminal Procedure on the 24th of December, 1929. The learned Magistrate started proceedings against the accused on the 25th of February, 1930, and then adjourned the case to the 7th of March, 1930. On the 7th of March, 1930, the prosecuting Sub-Inspector was not present and the case was adjourned to the 8th of March, 1930. It appears that he had gone to the Superintendent of Police to obtain certain orders in connection with this case. The Circle Inspector submitted a report to the Superintendent of Police on the 7th of March, 1930, and the latter forwarded a

(1) (1926) 25 A.L.J., 117 (121). (2) (1876) 25 W.R., 57 (60).  
(P.C.)

(3) (1903) 6 O.C., 192 (194).

report to the Magistrate "for favour of tendering accused Dattu a conditional pardon as proposed by Circle Inspector". When the case was taken up by the Magistrate on the 8th of March, 1930, he actually granted pardon to Dattu under section 337 of the Code of Criminal Procedure. Dattu stated in reply to the question put to him by the Magistrate that he would make a true statement whether he was granted pardon or not and that he was ready to state the true facts which were known to him.

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The learned Magistrate then proceeded to record the statement of Dattu and put the following question to him as the first question: "You have just now admitted that you would make a true disclosure of the facts within your knowledge. Now state those facts". Dattu then denied all knowledge of the matter in his statement before the Magistrate, and made a statement about the tortures to which he was subjected by the police and others. The Magistrate has stated in his Committal Order how he tendered pardon to Dattu and how the latter made the statement which he recorded on the 8th of March, 1930. He says in his Committal Order:—

"I offered conditional pardon to Dattu under section 337 of the Code of Criminal Procedure, but though he offered to make a true and unmingled disclosure of the facts of the case, he simply made a statement of his tortures and nothing else".

It is noticeable that it was noted in the order sheet dated the 8th of March, 1930, that Dattu was examined as an approver (*izhar Dattu mulzim bahaisiat approver likha gaya*). Though all this took place in the court of the Committing Magistrate, yet Dattu was committed for trial to the Court of Ses-

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sions along with other accused named above. The appellants' learned counsel contends that this was illegal under the provisions of section 339 of the Code of Criminal Procedure (as amended). Section 339 of the Code of Criminal Procedure is in the following terms :—

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“Where a pardon has been tendered under section 337 or section 338, and (*the Public Prosecutor certifies that in his opinion*) any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, such person may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter :—

Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was made : In which case it shall be for the prosecution to prove that such conditions have not been complied with . . . ”.

The learned Government Advocate admits that a conditional pardon was tendered to Dattu but he says that Dattu was not really examined as an approver in this case. We are not prepared to agree with him on this point. The proceedings of the Committing Magistrate show clearly that Dattu was examined as an approver. It is true that no oath was administered to Dattu but this omission does not establish that the Committing Magistrate did not

examine or did not mean to examine Dattu as an approver. The fact is that he examined Dattu as an approver and noted this clearly in his order sheet as mentioned above. If oath was not administered to Dattu at the time he was examined as an approver, then this is another irregularity or illegality committed by the Magistrate. The judgment of the learned Sessions Judge shows that the defect under consideration was noticed by him, but he got over the difficulty by making the following observation in his judgment :—

“I was wondering whether, in view of section 339 of the Code of Criminal Procedure, Dattu could, after the offer of pardon, be committed to this Court as an accused jointly with others. But I do not think now on a careful consideration of the matter that Dattu can be deemed to have been granted any pardon by the Committing Magistrate. He has certainly not been examined on oath and was never treated as an approver in the court below. Pardon is granted to persons who have taken part in any crime and are cognizant of the facts connected therewith. Dattu admitted on the 8th of March, 1930, that he knew nothing. He could not, therefore, be granted any pardon and the Magistrate was justified in not making him an approver.”

We find, however, on examining the record of the Committing Magistrate that pardon was actually granted to Dattu and that Dattu was actually examined as an approver. The learned Sessions Judge has referred to two rulings, (I. L. R. 29 All., 24 and 45 Mad. L. J., 613) on this point. We have considered these rulings. They do not apply to the present case simply for the reason that the cases to which they

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relate were decided before the passing of the Criminal Procedure Amendment Act of 1923. The proviso, quoted above, was introduced for the first time by the Criminal Procedure Amendment Act of 1923. We think there has been a most serious and material error in the proceedings in this case which has been greatly to the prejudice of the prisoners. It is admitted that the confessions of Rameshwar and Dattu form the chief basis of the prosecution case against all the accused, as observed by the learned Judge. We find that Dattu's confession is comparatively more detailed than the confession of Rameshwar. As Dattu has been tried jointly with the other accused named above, his confession has been used as evidence against his co-accused. This could never have been the case if Dattu, who had been examined as an approver, had not been tried jointly with the other prisoners named above. The error which has come to our notice is not a mere formal defect of procedure. It is a substantial error of law. The procedure adopted by the Committing Magistrate, after he had examined Dattu as an approver, having tendered pardon to him, was one which the Code positively prohibited. We accept the contention of the appellants' learned counsel that this is an illegality which vitiates the whole trial.

The result is that we allow the appeals and setting aside the convictions and sentences direct that (1) Salik Ram, (2) Rameshwar, (3) Jaigobind and (4) Ram Lotan accused be re-tried according to law.

As regards Dattu, we direct that such action should be taken against him as the Magistrate or the Sessions Judge might think proper with due regard to the provisions of sections 339 and 339A of the Code of Criminal Procedure. We set aside his conviction and sentence also, in the case before us, and direct that the proceedings be quashed. Proper proceedings will be taken against him and he will then be tried again, separately, according to law.

*Appeal allowed.*