1934

MAHRAJ RAM BILAS v. SRIPAL SINGH

respondent is therefore precluded, in view of this decision, from objecting to the appellant's application for a personal decree.

The learned counsel for the respondent has tried to distinguish the present case from the Full Bench case by saying that while in that case there was in the plaint a prayer for the relief of a personal decree, in the present case there was no such prayer. We think, however, that the wording in which relief B of the plaint, namely the general relief, was asked for did include a prayer for a personal decree. In relief A of the plaint, the appellant prayed for foreclosure and in the alternative for sale of the mortgaged property and in relief B he claimed "any other or further relief which the Court should consider just and which the nature of the suit should admit of." The words "which the nature of the suit should admit of" are significant. As a prayer for a personal decree is usual in a suit for sale, relief B should in our opinion be presumed to have included such prayer.

Srivastava, A. C. J., and Ziaul Hasan, J.

We therefore allow this appeal with costs and setting aside the orders of the courts below, order that a decree under Order XXXIV, rule 6 of the Code of Civil Procedure be passed in favour of the appellant.

Appeal allowed.

REVISIONAL CRIMINAL

Before Mr. Justice E. M. Nanavutty and Mr. Justice Ziaul Hasan

ONKAR SINGH (APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

1934 *September*, 7

Criminal Procedure Code (Act V of 1898), sections 233, 342 and 537, Arms Act (XI of 1878), section 19(d)—Indian Penal Code (Act XLV of 1860), section 411—Possession of stolen gun without licence—Charge under section 19(d), Arms Act, and section 411, I. P. C.—Separate trial in respect of each offence,

*Criminal Revision No. 81 of 1934, against the order of Mr. G. B. Chatterji, Additional Sessions Judge of Hardoi, dated the 19th of March, 1934.

1934

ONKAR SINGH v. KING-EMPEROR

if necessary—Accused not given opportunity to explain away circumstances appearing against him—Omission, if vitiates the trial—Defect, if cured by section 537—Provisions of section 342, whether mandatory.

The principles underlying the provisions of section 342 of the Code of Criminal Procedure are based on the legal maxim *"Audi alteram partem"* (hear the other side) and the section contemplates that the accused should be heard and his explanation taken on every circumstance appearing in the evidence against him. Its provisions must be strictly enforced and disobedience of the express mandatory provisions of this section cannot be condoned under section 537 as being a mere irregularity.

Where, therefore, the accused is not given an opportunity to explain away the circumstances weighing against him after the witnesses for the prosecution have been examined and cross-examined and before he is called on for his defence he is seriously prejudiced in his defence on the merits and the whole trial is vitiated.

Subrahmania Ayyar v. *King-Emperor* (1), relied on. *Ponnusamy Odayat* v. *Ramasamy Thathan* (2), and *King-Emperor* v. *Nga La Gyi* (3), referred to.

Where an accused is charged with two distinct offences, one under section 19(*d*) of the Indian Arms Act for being in possession of a gun without licence and the other under section 411, I. P. C., for being in possession of stolen property knowing or having reason to believe it to be stolen property, the provisions of sections 234, 235, 236 and 239 cannot be made applicable to the case and under section 233, Cr. P. C., the accused is entitled to a separate trial in respect of each offence charged against him.

Mr. *S. C. Dass*, for the appellant.

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

NANAVUTTY and ZIAUL HASAN, JJ.:—This is an application for revision of an appellate judgment of the learned Additional Sessions Judge of Hardoi, confirming a judgment of Mr. Mohammad Jamiluddin, a Magistrate of the first class in the district of Hardoi, convicting the applicant, Onkar Singh, and sentencing him for an offence under section 19(*d*) of the Indian Arms Act to

(1) (1902) I.L.R., 25 Mad., 61. (2) (1923) I.L.R., 46 Mad., 758.
(3) (1931) I.L.R., 9 Rang., 506.

pay a fine of Rs.75, and further convicting him of an offence under section 411 of the Indian Penal Code and sentencing him to pay a further fine of Rs.50. In default of payment of fine in each case, the accused applicant, Onkar Singh, was to suffer rigorous imprisonment for two months.

Nanavutty and Ziaul Hasan, JJ.

This application for revision was originally heard by a learned Judge of this Court sitting singly, who by his order, dated the 2nd of August, 1934, referred it under section 14(2) of the Oudh Courts Act for decision by a Bench of two Judges in view of the fact that the application raised a question of law, on which there were divergent views of the High Courts in India.

We have heard the learned counsel for the applicant, as also the learned Assistant Government Advocate, and taken time to consider the question of law raised in this revision before coming to our decision.

It has been strenuously argued before us that the learned trying Magistrate as well as the learned Additional Sessions Judge of Hardoi erred in law in not taking into consideration the fact that no question under section 342 of the Code of Criminal Procedure was put to the applicant about the delivery of the key of the cattle-shed, in which the alleged stolen gun lay concealed. We have carefully examined the record of the case framed by the learned Magistrate. We find that the trying Magistrate, Mr. Jamiluddin, examined the accused applicant Onkar Singh on the 4th of January, 1934, after recording the examination-in-chief of three witnesses for the prosecution, who were cross-examined a few weeks later on the 19th of January, 1934, and the 24th of January, 1934, after the charge-sheet had been framed on the 4th of January, 1934. The examination of the accused under section 342 of the Code of Criminal Procedure and recorded under section 364 of the Code of

1934

ONKAR SINGH v. KING-EMPEROR

Criminal Procedure by the trying Magistrate was done in a most perfunctory manner. It runs as follows:

"On the 27th of October the gun (Ex. 1) was found in the southern *kothari* of my cattle-shed over the *bhusa*.

The gun was not in my possession without a licence, nor was I in possession of it as stolen property, knowing it to be so.

Some bad characters planted the gun in my *kothari*.

I shall produce defence."

Nanavutty and Ziaul Hasan, JJ.

It will be seen from a mere perusal of the statement of the accused, recorded by the trying Magistrate, that the imperative provisions of section 342 of the Code of Criminal Procedure have been completely violated. The latter portion of sub-section (1) of section 342 of the Code of Criminal Procedure lays down that the Court "shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." It is clear that in the present case the accused was not given an opportunity to explain any circumstances appearing in the evidence against him, nor was he questioned by the learned trial Magistrate after the witnesses for the prosecution had been examined, cross-examined and re-examined, but he was merely asked a few general questions immediately after the examination-in-chief of the prosecution witnesses was over. The learned Magistrate as well as the learned Sessions Judge have laid special emphasis on the fact that the key of the lock was produced by the accused Onkar Singh after removing it from his sacred thread or *janeu*, when a threat was held out to him that if he did not open the lock, a blacksmith would be sent for to break open that lock. Although this fact weighed with the learned trying Magistrate as well as with the learned Assistant Sessions Judge, yet no question was asked of the accused

1934

ONKAR SINGH v. KING-EMPEROR

Onkar Singh as to what he had to say about the evidence of the prosecution witnesses on this point.

The learned counsel for the accused applicant has cited a string of rulings of the High Courts of Madras, Bombay and Calcutta in support of his contention that the provisions contained in the latter part of sub-section (1) of section 342 of the Code of Criminal Procedure are imperative and disobedience of that provision amounts to an illegality and vitiates the whole trial. There is, no doubt, a conflict of opinion as to whether this section 342 of the Code of Criminal Procedure applies to trials of summons cases. According to the view held by the High Courts of Bombay, Calcutta, Allahabad, Patna and Lahore and the Courts of the Judicial Commissioners at Karachi and Nagpur, the trying Magistrate is bound in a summons case to examine the accused under this section 342 of the Code of Criminal Procedure. According, however, to the Madras High Court this section 342 does not apply to trials in summons cases. The view of the Madras High Court in *Ponnusamy Odayat and three others* v. *Ramasamy Thathan* (1) has been followed by the Rangoon High Court in *King-Emperor* v. *Nga La Gyi and another* (2).

Nanavutty and Zaiul Hasan, JJ

In this conflict of judicial opinion we feel that there is much to be said for the view of Sir JAMES FITZJAMES STEVEN, who characterized section 342 of the Code of Criminal Procedure as embarrassing, illogical and hypocritical, and has laid down a rule of procedure for courts of India, which is at complete variance with English Law. It is a principle of English Law that the whole burden of proving an offence is on the prosecution; the accused need merely stand by and do nothing and on no account is he to be compelled to incriminate himself. The Indian Legislature has, however, in the Code of Criminal Procedure emphasized the fact that the object of a trial in a criminal case is to get at the truth of the facts and that the accused must assist the

(1) (1923) I.L.R., 46 Mad., 758, (F.B.) (2) (1931) I.L.R., 9 Rang., 506 (F.B.).

1934

ONKAR SINGH v. KING-EMPEROR

court in arriving at the truth, and the answers given by the accused, though not "evidence" in the strict legal sense, may be "taken into consideration" by the court in arriving at its conclusion, whatever the phrase "may be taken into consideration" may be deemed to mean. The principles underlying the provisions of *section 342 of the Code* are based on the legal maxim, "*Audi alteram partem*" (hear the other side) and this section contemplates that the accused should be heard and his explanation taken on every circumstance appearing in the evidence against him. The object of this section is to ensure that the trying court, after having heard the prosecution, should proceed to hear the defence also and for this purpose the court must interrogate the accused and call upon him to explain, if he can, the circumstances appearing against him. The provisions of this section are meant as much to safeguard the interests of the accused as to enable the court to come to a right conclusion as to the truth of the charge made against the accused, and the provisions of the Statute, therefore, must be strictly enforced, and disobedience of the express mandatory provisions of this section cannot be condoned under section 537 of the Code of Criminal Procedure, as being a mere irregularity. The object of this section is that the accused should be brought face to face with the witnesses, who give evidence against him, and should be solemnly given an opportunity to make a statement from his place in the dock, so that the court may have the advantage of hearing his defence, if he is willing to make one with his own lips.

Nanavutty and Ziaul Hasan, JJ.

It will serve no useful purpose for us to discuss at length the various rulings of the different High Courts, cited before us by the learned counsel for the accused as well as by the learned Assistant Government Advocate. Apart from the case law on the subject, the provisions of section 342 of the Code of Criminal Procedure seem to us to be very clear and mandatory, so far as the latter portion of sub-section (1) of this section

is concerned. Rules of procedure in a criminal trial are primarily meant to safeguard the interests of the accused, and failure to comply with such rules must of necessity prejudice the accused in his defence on the merits. In *Subrahmania Ayyar* v. *King-Emperor* (1) their Lordships of the Privy Council observed as follows:

> "Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Their Lordships cannot regard this as cured by section 537 (of the Code of Criminal Procedure)."

The mandatory provisions of section 342 of the Code in respect of the examination of the accused for the purpose of enabling him to explain any circumstance appearing in evidence against him after the witnesses for the prosecution have been examined and cross-examined and before he is called on for his defence, can only be enforced in any particular case, if in any case, when there is a breach of these provisions, the trial is held to be illegal and the conviction and sentence set aside, otherwise the accused is necessarily prejudiced in his defence on the merits.

As pointed out by their Lordships of the Privy Council in the ruling cited above, "The remedying of mere irregularities is familiar in most systems of jurisprudence", but when the Code of Criminal Procedure expressly lays down a mandatory provision in respect of a certain matter in the interest of the accused, then failure to comply with that provision of the Code cannot be deemed to be a mere irregularity, which has not occasioned a failure of justice. In the present case we have no doubt whatsoever that the applicant Onkar Singh has been seriously prejudiced by the fact that he had not been given any opportunity to explain away the circumstances, which weighed so heavily both with the trying Magistrate and the lower appellate court

(1) (1902) I.L. R., 25 Mad., 61.

1934

ONKAR SINGH v. KING-EMPEROR

Nanavutty and Ziaul Hasan, JJ.

in coming to the conclusion as to his guilt in respect of two very different charges.

In the present case we note that the accused has been tried for two very distinct offences, one under section 19(*d*) of the Indian Arms Act and the other in respect of being in possession of stolen property, knowing or having reason to believe it to be stolen property. Under section 233 of the Code of Criminal Procedure it is laid down that "for every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239." We are of opinion that the provisions of sections 234, 235, 236 and 239 cannot be made applicable to the facts of the present case, and the accused was entitled to a separate trial in respect of each offence charged against him. For this reason also the trial of the accused in the court of the learned Magistrate was illegal.

In the language of their Lordships of the Judicial Committee in the case cited above, "when the Code positively enacts that such a trial as that which has taken place here shall not be permitted", then such a contravention of the provisions of the Code cannot come within the description of error, omission, or irregularity mentioned in section 537 of the Code.

For the reasons given above we allow this application for revision, set aside the convictions and sentences passed upon the applicant Onkar Singh, remand the case to the court of the District Magistrate of Hardoi and direct that the two offences said to have been committed by the applicant Onkar Singh be tried separately by some Magistrate of the first class subordinate to the District Magistrate other than the Magistrate who has already tried the applicant.

The fines, if paid by the applicant, will be refunded to him.

Application allowed.