Before Sir C. M. King, Knight, Chief Judge

KING-EMPEROR (COMPLAINANT) *v.* KARNA SHANKAR AND OTHERS (ACCUSED)* 1935 *August*, 13

Criminal Procedure Code (Act V of 1898), sections 263, 342, 364 and 537—Gambling Act (III of 1867), sections 3 and 4—Charge under Gambling Act—Summons Case—Summary trial—Examination of accused under section 342, whether necessary—Recording of examination of accused—Failure to examine accused, effect of—Presumption of prejudice to accused—Defect, if curable under section 537.

The provisions of section 342 of the Code of Criminal Procedure apply to summons cases even if they are tried summarily and the Court must, therefore, examine the accused in accordance with the provisions of that section. It is clear from the language of section 263(g) that if the accused are examined then some record should be made of their examination. The provisions of section 364 are not applicable to summary trials but this only means that the examination of the accused person need not be recorded in full, including every question and every answer, as laid down in section 364, but it is clear that some notes must be made of the examination of an accused person in a summary trial, if he is examined. *Onkar Singh* v. *King-Emperor* (1), *Bhagwan* v. *Emperor* (2), *Emperor* v. *Nabu* (3), and *Sia Ram* v. *Emperor* (4), referred to.

Failure to examine an accused person under section 342 is an irregularity which goes to the root of a fair trial and cannot be regarded as a mere technical error of procedure. Prejudice to the accused may be presumed in such a case and the defect is therefore not curable under section 537. The irregularity is therefore sufficient to vitiate the trial.

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

Dr. *H. N. Misra*, for the accused.

KING, C.J.:—This is a reference made by the learned Sessions Judge of Hardoi recommending that the

*Criminal Reference No. 19 of 1935, made by Pandit Tika Ram Misra, Sessions Judge of Hardoi.

(1) (1934) 11 O.W.N., 1206. (2) (1926) Nagpur, 300.
(3) (1926) Sindh, 1 (F.B.). (4) (1935) A.L.J., 257.

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convictions under sections 3 and 4 of the Public Gambling Act should be set aside.

Nine persons were sent up for trial, all of them being charged under section 4 of the Gambling Act and one of them being further charged under section 3 of that Act. The case was tried summarily and resulted in the conviction of all the accused persons, except one who was given a pardon as an approver.

The learned Sessions Judge has made this reference on the ground that the accused were not examined under section 342 of the Code of Criminal Procedure for the purpose of enabling them to explain the circumstances appearing in the evidence against them.

There is a good authority for holding the provisions of section 342 apply to summons-cases even if they are tried summarily. Section 262 lays down that in a summary trial the procedure prescribed for summons-cases shall be followed in summons-cases "except as hereinafter mentioned." Reliance has been placed by the learned counsel who supports this reference upon the judgment of a Bench of this Court in *Onkar Singh* v. *King-Emperor* (1). In that case it was held that in the trial of a summons-case the provisions of section 342 were applicable and the Court was bound to examine the accused persons in accordance with the provisions of that section. It was also held that the absence of such examination must of necessity prejudice the accused in his defence on the merits. Further authority has been shown for the proposition that the provisions of section 342 apply to summary trials:

See *Bhagwan* v. *Emperor* (2), *Emperor* v. *Nabu and others* (3) and *Sia Ram* v. *Emperor* (4).

The learned Government Advocate does not contest the proposition that section 342 applies to the trial of a summons-case but he has argued that it does not apply to the summary trial. In my opinion that contention

(1) (1934) 11 O.W.N., 1206.
(2) (1926) Nagpur, 300.
(3) (1926) Sindh, 1 (F.B.).
(4) (1935) A.L.J., 257.

is untenable in view of the language of section 262 which expressly lays down that in a summary trial the procedure prescribed for summons-cases shall be followed in summons-cases unless there is anything expressly provided to the contrary. There appears to be nothing in Chapter XXII which expressly shuts out the application of section 342 from summary trial, and therefore I think it follows that its provisions are applicable to a summary trial. No authority to the contrary has been cited.

In the case before me the applicants were merely asked whether they pleaded "guilty" or "not guilty" and they pleaded "not guilty" and stated that they would produce defence. There is nothing to show that they were questioned with a view to enable them to explain the circumstances appearing in evidence against them. It is clear from the language of section 263, clause (*g*) that if the accused are examined then some record should be made of their examination. The provisions of section 364 are not applicable to summary trials but this only means that the examination of the accused person need not be recorded in full, including every question and every answer, as laid down in section 364, but it is clear that some notes must be made of the examination of an accused person in a summary trial, if he is examined. The learned Magistrate in his explanation states that he does not remember whether the provisions of section 342 were complied with. As there is no note of any kind showing that the accused persons were examined we must take it, for the purpose of this application, that they were not examined for the purpose of enabling them to explain the circumstances appearing in evidence against them. In view of the authorities cited, with which I agree, the failure to examine the accused persons under section 342 was certainly an irregularity.

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A further question arises whether the irregularity is sufficient to vitiate the trial, whether any prejudice has been caused to the accused or not. The view taken by the Allahabad High Court in the ruling cited above was that the disregard of the mandatory provisions of section 342 did not necessarily vitiate the trial but was curable under section 537 unless it was shown that some prejudice had been caused to the accused, or that the irregularity had occasioned a failure of justice. A similar view seems to have been taken by this Court in the ruling cited above but they took the view that if the accused person is not examined under section 342 he must *necessarily* be prejudiced. They did however come to a further express finding that he had in fact been prejudiced in the case before them. I am bound to follow, and may add that I agree with, the ruling in *Onkar Singh* v. *King-Emperor* (1). It is perhaps going too far to say that an accused is *necessarily* prejudiced by not being questioned under section 342. This remark may be treated as an *obiter dictum,* as it was expressly found in that case that the accused had in fact been prejudiced. But I think prejudice may be *presumed* in such circumstances, and it would rarely be possible to show that no prejudice resulted. The statutory provisions requiring a Court to question an accused person, for the purpose of enabling him to explain the circumstances appearing in evidence against him, are of vital importance. It is one of the most fundamental principles to be observed in a criminal trial that the accused should be called upon to explain the evidence against him and should be thus given an opportunity of stating his own case. The maxim "*Audi alteram partem*" expresses an elementary rule of justice. The failure to examine an accused person, therefore, is an irregularity which goes to the root of a fair trial and cannot be regarded as a mere technical

(1) (1934) 11 O.W.N., 1206.

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error of procedure. In the present case the accused had no opportunity of explaining the evidence against them. They had no opportunity of explaining how they came to be arrested or of stating whether the house was or was not a "*common gaming house*". They might have given some explanation of the small sum of money which was said to constitute the *nal* for the benefit of the occupier of the house. In the circumstances I think it must be held that the accused were prejudiced and the failure to examine them under section 342 was sufficient to vitiate the trial.

The question arises whether it is advisable to order a retrial. In my opinion no retrial is required as the case is, after all, of a petty nature and the accused persons have been put to much trouble and expense in applying to the learned Sessions Judge and to this Court.

I accordingly accept the reference and set aside the convictions and sentences. The fines, if paid, will be refunded.

Reference accepted.

APPELLATE CRIMINAL

Before Mr. Justice Bisheshwar Nath Srivastava

W. J. PHILLIPS (APPELLANT) *v.* KING-EMPEROR (COMPLAINANT-RESPONDENT)*

1935 *August*, 20

Indian Penal Code (Act XLV of 1860), section 497—Divorce Act (IV of 1869), section 61—Adultery—Charge of adultery definite about place—Specification of date, how far necessary—Section 61, Divorce Act, whether bars criminal proceedings for adultery.

Where a charge of adultery is sufficiently definite as regards the places where the offence is said to have been committed and as regards the date, it is impossible to assign particular dates on which sexual intercourse took place, it is enough to specify the period within which the offence is alleged to have

*Criminal Appeal No. 274 of 1935, against the order of Babu Gopendra Bhushan Chatterji, Sessions Judge of Gonda, dated the 4th of May, 1935.