

A month's time will be allowed from this date to the applicant for extension of the time allowed by law for the filing of an appeal with the proper court-fee.

SCROOPE, J.—I agree.

Application rejected.

1927.

RAGHUNATH
PRASAD
SAHU
v.
MUSSAMMAT
RAMPIARI
KUER.

REVISIONAL CRIMINAL.

Before Adami and Scroope, JJ.

BIGAN SINGH

v.

KING-EMPEROR.*

1927.

Feb., 10.

Code of Criminal Procedure, 1898 (Act V of 1898), sections 353, 530 and 537—witnesses not examined in presence of accused—trial vitiated.

Except in the cases mentioned in section 353 of the Code of Criminal Procedure, 1898, a trial is vitiated by failure to examine the witnesses in the presence of the accused person.

Where, therefore, the witnesses were examined-in-chief in the absence of the accused persons, and the latter's legal representative did not object but at a later date cross-examined the witnesses in the presence of the accused, *held*, that the trial was vitiated by the irregularity.

Subrahmania Ayyar v. King-Emperor (1), applied.

The facts of the case material to this report are stated in the judgment of Scroope, J.

H. L. Nandkeolyar (with him *D. L. Nandkeolyar*) for the petitioner.

C. M. Agarwala, Assistant Government Advocate, for the Crown.

SCROOPE, J.—The petitioner has been convicted under section 211/109 of the Indian Penal Code for

*Criminal Revision no. 41 of 1927 against an order of J. A. Saunders, Esq., I.C.S., Sessions Judge of Muzaffarpur, dated the 8th January 1927, modifying the order of A. Whittaker, Esq., I.C.S., Subdivisional Magistrate of Sitamarhi, dated the 4th December, 1926.

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

1927.

BIGAN
SINGH

v.

KING-
EMPEROR.

SCROOPE, J.

abetting one Ramawtar Singh in bringing a false case against Matha Kabari of Madhkaul and was sentenced to 18 months' rigorous imprisonment by the Sub-divisional Magistrate of Sitamarhi. His sentence was reduced on appeal to nine months by the Sessions Judge of Muzaffarpur. He has now filed a revisional petition in this Court and the first contention taken on his behalf by the learned Counsel arises in the following way.

Two separate complaints were lodged in this case against the petitioner and Ramawtar Singh who has been tried and convicted under the substantive section. It appears that the latter's case was taken up first and on the 13th September 1913 witnesses were examined in that case. The next date was the 23rd September and on that date we find the following order—

“The case against Ramautar should have proceeded jointly with the case against Bigan. The evidence against the accused is exactly the same as that against Ramautar. Bigan is present. The evidence against Ramautar is read out in Hindi to the prosecution witnesses who admit that it is correct. Bigan has heard all the evidence. His Mokhtear who appears also for Ramautar raises no objection and files a petition for one cross-examination. Charge under section 211/109 framed against Bigan.”

Thus there was no compliance with the provisions of section 353 of the Criminal Procedure Code which requires that with certain exceptions which are not in question, the evidence should be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader. Admittedly there was no order of the Court dispensing with his personal attendance for the purpose of this trial and in fact it appears that on the 13th September when the examination-in-chief of the prosecution witnesses in Ramawtar's case was taken he was not present at all in Court but was giving evidence in the Session Court. Then on the subsequent day the evidence in Ramawtar's case was read over to him as described above. The contention then that the trial is bad on this account must succeed.

The learned Assistant Government Advocate urges that the irregularity is one that is cured by section 537 of the Criminal Procedure Code as it does not fall within the irregularities described in section 530. In my opinion the irregularity is of the class referred to by their Lordships of the Privy Council in *Subrahmanya Ayyar v. King-Emperor*⁽¹⁾ where the view expressed is that the disobedience to an express provision as to a mode of trial is more than an irregularity. When the Code enacts positively that evidence should be taken in a certain way it cannot be said that a contravention of this express provision comes within the description of error, omission or irregularity and I do not think that the waiver of any objection by his Mukhtar on this score improves the case for the prosecution. To accept the view that such waiver can get over disregard of an express provision of the Code would open the door to all kinds of irregularities and defects in procedure. The trial must be held to be bad on this account and the application must succeed and the conviction and sentence of the petitioner must be set aside.

As regards the question of re-trial there is an absence of direct evidence connecting the petitioner with the filing of the criminal case. The petitioner's case throughout has been that he sent Aklu and not Nathuni to realise money from Ramawtar whereas Ramawtar's case is that Nathuni was sent. Had there been a conspiracy between them as found by the lower Courts, I think this evidence would have been identical on this question. The circumstances of course are gravely suspicious against the petitioner, but taking all the facts and circumstances into consideration and that the petitioner has already served a certain amount of imprisonment, I do not think that it is a fit case in which to direct a re-trial.

ADAMI, J.—I agree.

Rule made absolute.

1927.

BIGAN
SINGH

v.

KING-
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(1) (1902) I. L. R. 25 Mad. 61, P. C.