## APPELLATE CRIMINAL.

*Before Mr. Justice Carr.*

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*Apl.* 3.

# K. M. SUBBAYA NAIDU

*v.*

# KING-EMPEROR.*

*Criminal Procedure Code (Act V of 1898), ss. 342, 537—Failure to re-examine accused after the recall of prosecution witnesses and after examination of fresh witnesses—Procedure whether illegal or merely irregular—Accused's case not prejudiced, then an irregularity only.*

The accused was examined after the evidence of a number of prosecution witnesses was concluded. Then two other Crown witnesses were examined and after that a number of prosecution witnesses were recalled and cross examined. The accused was never examined again, and after the defence witnesses were examined, judgment was passed against the accused.

*Held*, that such procedure was in violation of the provisions of s. 342 of the Criminal Procedure Code. The accused should have been examined after the two fresh prosecution witnesses had been examined and further re-examined after the Crown witnesses were recalled and cross-examined. But the failure of the trial Court to do so, if it did not cause prejudice to the accused, amounted to an irregularity which is curable under s. 537 of the Code, and not an illegality which vitiates the trial altogether.

*Abdul Rahman* v. *K.E.*, 5 Ran. 53 (P.C.) ; *Byrne* v. *The Crown*, 4 Lah. 61 ; *Emperor* v. *Bechu*, 45 All. 124 ; *Nga Hla U* v. *K.E.*, 3 Ran. 139 ; *Saiyid Mohiuddin* v. *K.E.*, 4 Pat. 488 ; *Subramania* v. *K.E.*, 25 Mad. 61 ; *Varisai Rowther and another* v. *K.E.*, 46 Mad. 449—*referred to.*

*Jummon* v. *Emperor*, 50 Cal. 308 ; *Legal Remembrancer, Bengal* v. *S. C Roy*, 51 Cal. 924 ; *Madura Muthu and six others* v. *K.E.*, 45 Mad. 820 ; *Mazahar Ali* v. *Emperor*, 50 Cal. 223 ; *Pramatha Nath* v. *Emperor*, 50 Cal. 518—*dissented from.*

*Villa* for the appellant.

*Tun Byu* (Assistant Government Advocate) for the Crown.

CARR, J.—On or about the 20th of January 1928, a leaflet headed "Are we dogs" was distributed at various places on the railway line between Rangoon and Mandalay from a passing train and also at

* Criminal Appeal No. 221 of 1929, from the order of the District Magistrate of Rangoon in Criminal Regular Trial No. 148 of 1928.

Mandalay itself where at that time a meeting of the Hindu Sabha was being held.

On the 10th of March 1928 the Commissioner of Police, Rangoon, under the orders of the Local Government filed a complaint under section 124A of the Penal Code against the present appellant K. N. Subbaya Naidu, the editor of a newspaper called "The Desopakari" and Chellan Pillay, the Assistant Manager of that paper.

At that time the appellant was not to be found and Chellan Pillay alone was tried. He was convicted by the District Magistrate of Rangoon but on appeal was acquitted by this Court on the 15th of August 1928.

On the 22nd of October 1928 the appellant surrendered himself to the District Magistrate in Rangoon, who then proceeded to try him for the offence and has convicted him and sentenced him to three years' rigorous imprisonment. Against that conviction he appeals.

The petition of appeal is lengthy and verbose. It contains contentions that the District Magistrate had no jurisdiction to try the case and that the leaflet was not seditious and the rest of it may be summed up into the contention that the evidence in the case was not sufficient to prove the publication of the leaflet by the appellant. At the hearing of this appeal Mr. Villa, who appeared for the appellant, has dropped the contention that the District Magistrate had no jurisdiction. I may say also that that contention was really unsustainable. Part of the evidence against the appellant is to the effect that he had this leaflet set up in type in his own press at Rangoon and if that fact is proved, then clearly the District Magistrate of Rangoon could try the case. Other evidence is to the effect that the appellant distributed

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the leaflet at various stations on the Rangoon-Mandalay Line, while he was travelling from Rangoon to Mandalay and if that fact is proved, under section 183 of the Criminal Procedure Code the District Magistrate had jurisdiction.

Mr. Villa has also dropped the contention that the leaflet was not seditious. Obviously it was almost seditious and inflammatory composition containing direct incitement to murder every Englishman in Burma, referring, in particular, to the collection of the *thathameda* tax.

Mr. Villa has, however, raised a further contention of law that the trial is invalid by reason of the District Magistrate's failure to observe the provisions of section 342 of the Criminal Procedure Code.

The facts relevant to this contention are that up to the 28th of November 1928, twenty-five witnesses for the prosecution had been examined. The accused himself was then examined. His examination was very brief; but he said at its close that he had prepared a statement which would be translated and filed in Court. He did in fact put in a lengthy statement occupying four pages of type. This is dated the 14th December 1928. When it was actually filed, does not appear on the record; but it seems probable that it was filed on the 17th of December, which was the date of the next hearing after the 28th of November. Probably if was put in at the beginning of that hearing. At that hearing two witnesses for the Crown, who had not previously been examined, were examined and after that a considerable number of the other prosecution witnesses were recalled and cross-examined on the 17th and 18th of December. On the 8th of January 1929, the defence witnesses were examined and finally judgment was passed on the 4th of February 1929.

After his examination on the 28th of November the appellant was not again examined. There can be no doubt that here the District Magistrate did disobey the provisions of section 342 of the Code. That section lays down that the Court *shall* examine the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. I have no doubt that this, applied to the present case, would require the accused to be re-examined when the prosecution witnesses had been recalled and cross-examined after he was finally charged and there is equally no doubt that, after two fresh prosecution witnesses had been examined after the framing of the charge, the section requires that the accused should be further examined.

The question is whether this is merely an irregularity which, if no prejudice has been caused thereby to the accused, is curable under section 537 of the Code or whether it is an illegality which vitiates the trial altogether.

Before discussing this question fully, I would say that in my opinion the irregularity or illegality whichever it may be has not in any way prejudiced the appellant. The evidence of the two additional witnesses called after his examination though relevant added nothing of any very material importance to the case as it stood before that; nor did there emerge from the cross-examination of the other prosecution witnesses any thing which required further explanation by the accused.

On the question now to be decided, there is a very considerable difference of opinion among the High Courts in India. In the case of *Madura Muthu Vannian and six others*, accused (1), a Bench of the Madras

(1) (1922) 45 Mad. 820.

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High Court held that the failure to examine an accused person after the prosecution witnesses had been recalled and cross-examined after the framing of the charge was not a mere irregularity curable under section 537 but an illegality which vitiated the trial. This case however was overruled in part at any rate by *Varisai Rowther and another*—petitioners (1), in which four out of the Full Bench of five Judges held that when an accused person had once been examined after the prosecution had finished calling evidence it was not obligatory on the Court to question him again after the cross-examination and re-examination of the prosecution witnesses recalled at the instance of the accused under section 256 of the Code. The Full Bench further held that, if the prosecution called fresh evidence after the charge was framed, the accused *must* be questioned generally on the case after this further examination of the prosecution witnesses.

The Calcutta High Court has in several cases taken the view set out in *Madura Muthu Vannian and six others* (2). These cases are *Mazahar Ali* v. *Emperor* (3); *Jummon Christian* v. *Emperor* (4); *Pramatha Nath Mukerjee* v. *Emperor* (5) and *Legal Remembrancer, Bengal* v. *Satish Chandra Roy* (6).

On the other hand in *Byrne* v. *The Crown* (7), one Judge of the Lahore High Court held when the witnesses for the prosecution had been examined and cross-examined at considerable length before the framing of the charge and the accused had at that stage been examined, the failure to re-examine the accused after the further cross-examination of the witnesses after the framing of the charge was a mere irregularity and no ground for setting aside the findings of

(1) (1923) 46 Mad. 449.
(2) (1922) 45 Mad. 820.
(3) (1923) 50 Cal. 223.
(4) (1923) 50 Cal 308.
(5) (1923) 50 Cal. 518.
(6) (1924) 51 Cal. 924.
(7) (1923) 4 Lah. 61.

the trial Court unless it had occasioned a failure of justice.

A considerably stronger case than this is *Saiyid Mohiuddin* v. *King-Emperor* (1), in which a Bench of the Patna High Court held : "In every case in which the legality of a trial is challenged on the ground that the provisions of section 342, Criminal Procedure Code, 1898, have not been complied with, the test is whether there has been prejudice to the accused by reason of the absence of judicial questions and whether the defect is cured by section 537 of the Code."

Another case is *Emperor* v. *Bechu Chaube and another* (2), which was before one Judge of the Allahabad High Court. In that case a fresh witness for the prosecution had been examined after the examination of the accused, who was not further examined on his evidence. That witness, however, did not add materially to the evidence which had been already given for the prosecution and which the accused had had an opportunity of explaining. It was held that, though there was an error, it did not in the circumstances vitiate the proceedings. This case was followed by my learned brother Brown in *Nga Hla U* v. *King-Emperor* (3). In that case no fresh witnesses for the prosecution had been examined after the examination of the accused and the question before the Court was whether the failure to examine the accused further after the prosecution witnesses previously examined had been recalled and cross-examined was a mere irregularity or illegality which vitiated the trial, it was held that it was a mere irregularity.

Considering the judgments in the cases above-mentioned it seems to me that the Calcutta and Madras High Courts have taken a very highly technical view

(1) (1925) 4 Pat. 488. (2) (1923) 45 All. 124.
(3) (1925) 3 Ran. 139.

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of the question while the other High Courts have dealt with it in relation to the merits of the cases before them. The view that the omission again to examine the accused is an irregularity curable under section 537, Criminal Procedure Code and not an illegality which vitiates the trial in my opinion, receives very considerable support from the judgment of their Lordships of the Privy Council in *Abdul Rahman* v. *The King-Emperor* (1). The question before their Lordships in that case was the effect of a failure properly to carry out the provisions of section 360, Criminal Procedure Code, in regard to the reading over to witnesses of their depositions. Their Lordships drew a distinction between that question and the question which arose in *Subrahmania Ayyar* v. *King-Emperor* (2), where the procedure adopted was one which the Code positively prohibited. The concluding paragraph in their Lordships' judgment runs as follows :—

"To sum up, in the view which their Lordships take of the several sections of the Code of Criminal Procedure, the bare fact of such an omission or irregularity as occurred in the case under appeal, unaccompanied by any probable suggestion of any failure of justice having been thereby occasioned, is not enough to warrant the quashing of a conviction, which on their Lordships' view, may be supported by the curative provisions of sections 535 and 537. Their Lordships will humbly advise His Majesty that this appeal should be dismissed."

These remarks, in my opinion, apply with equal force to the undoubted error which has occurred in this case, and in my view they render strong support to the view taken by my learned brother Brown in the case above mentioned.

As I have already said that the omission which occurred in this case has not in any way prejudiced the appellant nor was there any thing about it which

(1) (1927) 5 Ran. 53. (2) (1902) 25 Mad. 61.

could lead to a failure of justice being occasioned by it, I hold that the District Magistrate's error does not vitiate the proceedings and is a mere irregularity which is cured by the provisions of section 537 of the Criminal Procedure Code.

The only other question for consideration is whether on the evidence on the record the conviction of the appellant is justified.

[His Lordship held that it was justified and dismissed the appeal.]

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## APPELLATE CIVIL.

*Before Sir Guy Rutledge, Kt., K.C., Chief Justice and Mr. Justice Brown.*

## MA SEIN
*v.*
## P.L.S.K. FIRM AND ANOTHER.*

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*Apl.* 8.

*Specific Relief Act (I of 1877), s. 42, proviso—Judgment-debtor's fictitious transfer—Creditors' suit for bare declaration to declare transfer void—Consequential relief of setting aside deed unnecessary.*

Where under the provisions of s. 42 of the Specific Relief Act the creditors of a judgment-debtor choose to file a suit against him and the transferee of his property for a bare declaration that such transfer was void and ineffective as against them and that they were entitled to proceed in execution or otherwise against the property, such a suit would lie without the necessity of asking for the consequential relief of setting aside the deed of transfer.

*Ganga Ghulameq* v. *J. Prasad*, 26 All. 606—*referred to.*

*Kyaw Din* for the appellant.

*Chari* for the 1st respondent.

RUTLEDGE, C.J., and BROWN, J.—The 1st respondent P.L.S.K. Chettyar firm sued the appellant, Ma

* Civil First Appeal No. 230 of 1928 from the judgment of the District Court of Hanthawaddy in Civil Regular No. 57 of 1927.