CRIMINAL REVISION.

Before the Honourable Mr. J. W. F. Beaumont, Chief Justice, and Mr. Justice Madgavkar.

1930
July 16.

EMPEROR *v.* NURMAHOMED ABDUL KADAR AND OTHERS (ACCUSED NOS. 1, 2, 3, 9 AND 12).*

Criminal Procedure Code (Act V of 1898), sections 162 and 537—Illegitimate use of statements made to police, by defence—Statement not put in evidence—Magistrate using the statements as corroborative evidence—Irregularity of procedure not vitiating trial—No failure of justice—Indian Penal Code (Act XLV of 1860), section 395.

The accused were charged with offences under the Indian Penal Code. At the trial some of the accused made use of the statements made before the police for the purpose of cross-examining witnesses for the prosecution. These statements were not put in evidence and were not formally recorded by the Court. The Magistrate, however, considered the statements and acquitted those accused whose names were not mentioned to the Police, and using those statements as corroborative evidence convicted the applicants:

Held, that although the Magistrate was not justified in using the statements as corroborative evidence, as the accused themselves had infringed the provisions of section 162 of the Criminal Procedure Code in making an illegitimate use of the statements, it amounted to an irregularity which could be cured under section 537 of the Criminal Procedure Code inasmuch as it had occasioned no failure of justice.

Ashutosh Sikdar v. *Behari Lal Kirtania*[1] and *Emperor* v. *Bechu Chaube*,[2] applied.

N. A. Subramania Iyer v. *King-Emperor*,[3] distinguished.

APPLICATION against the order of the Sessions Judge, Surat, who confirmed the convictions and sentence passed by the Special First Class Magistrate, Surat, in Criminal Case No. 25 of 1928.

The applicants with other accused were charged originally under sections 147, 148, 149, 426, 451 and 395 of the Indian Penal Code, in connection with a riot in Surat which took place on or about September 29, 1928. The offence of dacoity under section 395 of the Indian Penal Code was triable by a Court of Session.

The case came on for trial before the Special Magistrate at Surat. After considering the evidence, the

* Criminal Revision No. 173 of 1930.

(1) (1907) 35 Cal. 61 at p. 72. (2) (1922) 45 All. 124.
(3) (1901) L. R. 28 I. A. 257.

Magistrate framed charges under sections 380, 440 and 454 of the Indian Penal Code, but refrained from framing a charge under section 395 of that Code on the ground that such a charge would be merely a technical one, and accepted the invitation of the defence to try the case himself.

At the trial, the defence counsel in cross-examining the Police Sub-Inspector and other witnesses made use of statements of certain witnesses made to the police for the purposes of ascertaining if the accused were identified before the police. The copies of the police statements were, however, not placed on the record but contradiction was obtained from the oral statement of the Police Sub-Inspector. The learned Magistrate used those statements made before the police as corroborative evidence for the purposes of identification and convicted those persons whose names were mentioned to the police and acquitted the rest of the accused. Accused Nos. 1, 2, 3, 4, 9 and 12 were convicted and sentenced to various terms of imprisonment.

Against these convictions, three appeals were presented to the Sessions Judge, one by accused No. 1, Noormohamed Abdul Kadar; another by accused No. 2, Abdul Rehman; and a third by accused Nos. 3, 4, 9, 12. Before the Sessions Judge it was argued that the Magistrate had no jurisdiction because technically the offence committed was one of dacoity and secondly the findings of the learned Magistrate were vitiated because he made an illegitimate use of the statements recorded by the police. The learned Sessions Judge overruled these objections and considering the evidence in the case confirmed the convictions and sentences and dismissed the appeals. He observed as follows:—

"The first answer to learned counsel's argument is, therefore, that the accused used police papers freely and the only defect was that they were not formally placed on record. Such an oversight was not an error of procedure which

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prejudiced the defence. The next answer is that not only should isolated portions of the police statements have been put on record, but the whole statements, for they were freely used to prove omissions. Such use is legitimate if the omission can be looked on as a contradiction. (See Mr. Justice Fawcett's remarks in *Emperor* v. *Vithoo Bala*, 26 Bom. L. R. 956). But the only way to prove an omission is to place the whole document on record, and it is fair, therefore, to say that all these police statements were proved by the defence and can be read as a part of the record. Once that was done the learned Magistrate was entitled to look at any part of them."

The accused presented three separate applications in revision to the High Court.

Velinker and *Azad*, with *S. K. Nabiullah*, for accused Nos. 1 and 2 in applications Nos. 173 and 174 of 1930.

S. K. Nabiullah, for accused Nos. 3, 9 and 12 in application No. 177 of 1930.

P. B. Shingne, Government Pleader, for the Crown.

BEAUMONT, C. J. :—These are applications in revision from the decision of the Sessions Judge, Surat, upholding the conviction of the accused before the Special Magistrate.

Now, the accused—I am only referring to the accused, who have appealed to this Court—were charged originally under sections 147, 148, 149, 426, 451 and 395 of the Indian Penal Code and they were convicted under sections 147, 440 and 380, Indian Penal Code, i.e., they were not convicted under section 395, which deals with dacoity.

The first point taken on behalf of the accused, by Mr. Velinker, is that the facts brought the case within section 395 and showed that the offence of dacoity had been committed, and that under the Schedule to the Code of Criminal Procedure, a case of dacoity was not within the jurisdiction of the Magistrate. The Magistrate seems to have had some doubt whether the facts justified a charge of dacoity or not, and he was invited by the defence to deal with the case himself. Accepting that invitation he framed a charge under sections 147,

440 and 380, and framed no charge under section 395, and as I have already said, he convicted the accused under the former three sections. The accused now say that the Magistrate had no jurisdiction to try the case, but the accused having invited the Magistrate to deal with the case and he having accepted that invitation, in my opinion, there is nothing in the point at all. The learned Magistrate did not, by the consent of the parties, assume jurisdiction to try a case which was outside his jurisdiction. That point would have arisen if he had framed a charge for dacoity and convicted the accused on that charge, but he did not do that. He framed a charge under the other sections—the sections under which he was invited to frame a charge by the defence, and it is not now open to the defence to object on the ground that he had no jurisdiction.

The next point is one of more substance and has been strenuously argued by Mr. Velinker. The point is that the Magistrate only convicted those accused whose names had been mentioned before the police on a previous occasion, and at page 22-A of his judgment, the learned Judge tabulates the accused who had been named before the police and identified by them. Now, Mr. Velinker says that in doing that the Magistrate was making an illegitimate use of police statements and was infringing the provisions of section 162 of the Criminal Procedure Code. It appears clear from the record that it was the defence themselves who made use of the statements before the police for the purpose of cross-examining various witnesses. It may be that that was not justified and that the Magistrate ought to have prevented the defence from so doing, and I think that if the defence had used the statements at all the Magistrate ought to have required them to put them in evidence and place them on the record, and he did not

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do that. I am disposed to think from the whole of his judgment that he probably did use the police statements in a way which was not justified by section 162, but then the question arises whether that user—assuming it to have been improper—is cured by section 537 of the Code of Criminal Procedure. That section provides :—

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chapter XXVII or on appeal or revision on account—

(*a*) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, . . .

unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice."

I am quite clear that the irregularity—if it be an irregularity in this case—has not occasioned a failure of justice. But, Mr. Velinker says that an infringement of the provisions of section 162 is not an irregularity, which can be cured under section 537. He says that it amounts to an illegality such as cannot be cured, and for that he refers to the judgment of Lord Halsbury in the Privy Council case of *N. A. Subramania Iyer* v. *King-Emperor*.[1] But that was a case very different from the present on the facts because the accused there was tried on an indictment charging him with no less than forty-one acts, extending over a period of two years, and undoubtedly the whole trial was illegal. The test as to what acts are irregularities within section 537 has been considered as a matter of principle in two cases, one of them in *Ashutosh Sikdar* v. *Behari Lal Kirtania*[2] where Mr. Justice Mookerjee says thus (72) :—

"As pointed out in Macnamara on Nullities and Irregularities, no hard and fast line can be drawn between a nullity and an irregularity; but this much is clear, that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation.

(1) (1901) L. R. 28 I. A. 257. (2) (1907) 35 Cal. 61.

for it, or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated. It may be conceded, that the application of this doctrine to an individual case, may sometimes be attended with difficulty. One test, however, is well-established, and is often useful; as was observed by Mr. Justice Coleridge in *Holmes* v. *Russel*,[1] ' it is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity '."

If you apply that test here, the accused could, I think, have waived the prohibition against using the statements to the police. The other case in which the general principle is discussed is *Emperor* v. *Bechu Chaube*.[2] Mr. Justice Stuart remarks (p. 126) :—

" The tests to be applied in considering whether a particular infringement of the provisions of the Criminal Procedure Code is one which does or does not come within the purview of section 537 appear to me to be these : Does the error go to the whole root of the trial? Does it in effect vitiate the proceedings? Has the court assumed an authority which it does not possess? Has it broken the vital rules of procedure? If the error is of such a nature, the proceedings are vitiated in their very inception and section 537 has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of that provision vitiates the whole proceeding. In fact it might very well be argued that in order to create an error there must be some breach of an imperative rule, for, if the matter were discretionary, it would appear that no opportunity for error could arise. What I have to consider is the simple point, were the proceedings vitiated? In my opinion they were not vitiated."

Now, that passage lays down a rule, which, I think, is of general application, and what one has to consider is whether any vital rule of procedure has been broken, and whether the irregularity goes to the root of the proceedings. In my view the infringement of section 162 committed as it was here in the first instance by the defence themselves, and not by the prosecution, is a class of irregularity which can be cured under section 537. In my judgment, therefore, this application fails and is dismissed.

MADGAVKAR, J. :—I agree. On the first point, this is not a case of an undoubted dacoity in which the Magistrate has deliberately framed a charge of robbery

[1] (1841) 9 Dowl. 487.

[2] (1922) 45 All. 124.

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in order to confer jurisdiction upon himself; on the contrary, he has accepted the view put forward for the defence that the facts did not constitute robbery and that the intention of the accused was at the most that of theft without the violence or extortion to aggravate it into robbery. It does not therefore lie in the mouth of the defence to turn round and complain of a result which was a consequence of their own contention.

On the second point, it was certain accused who were allowed excessive latitude beyond the strict provisions of section 162 and under the guise of omissions were permitted to all intents and purposes to transfer the entire purport of the police statements on to the record. All the accused whose names had not been mentioned to the police availed themselves of this privilege and elicited the fact that their names had not been mentioned. From this it was a plain inference that the names of the other accused had been mentioned. Had the judgment proceeded on that basis, the point could not have been taken. The learned Magistrate, however, in tabulating the results, evidently has proceeded further; but such a use of section 162 has not, for the reasons stated above, in fact, occasioned a failure of justice. It is at the most an irregularity without a failure of justice, and, therefore, as held in *Emperor* v. *Jehangir Cama*,[1] curable under section 537 of the Code of Criminal Procedure. I agree that the application should be dismissed.

BEAUMONT, C. J.:—I do not think that there is any ground for varying the sentence as there is no appeal on the merits. The unexpired portion of the sentence on the accused should be carried out.

Conviction and sentence confirmed.

K. S. S.

[1] (1927) 29 Bom. L. R. 903.