courtkutchehry.com

Company: Sol Infotech Pvt. Ltd.
Website: www.courtkutchehry.com
Printed For:
Date: 06/12/2025

(1954) 07 GAU CK 0006

Gauhati High Court

Case No: None

Barmura Lalung and Another	APPELLANT
Vs	
Jara Singh Hazarika	RESPONDENT

Date of Decision: July 16, 1954

Acts Referred:

- Penal Code, 1860 (IPC) - Section 427, 447

Citation: AIR 1955 Guw 218 : (1955) CriLJ 1466

Hon'ble Judges: Ram Labhaya, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

Ram Labhaya, J.
This is a reference u/s 438, Criminal P. C. from the learned Sessions Judge, Lower Assam Districts. The reference raises 2 questions which are as follows:

1. Whether in a trial under the summary procedure, it is incumbent on the Magistrate to follow the procedure laid down in Section 257, Criminal P. C, if the accused refuses to plead or does not plead or claims to be tried? and,

2. Whether failure on the part of the Magistrate to offer a chance to the accused to recall the prosecution witnesses as required u/s 256, Cr.PC is a mere omission or irregularity curable u/s 537, Cr. P. C?

2. The facts leading to the reference may be briefly stated. The petitioners before the learned Sessions Judge, Bormura Lalung and Melbar Lalung were tried on a charge under Sections 447/427, Penal Code by Mr. Ahmed, Magistrate, first class, Nowgong. They were tried summarily and as a result of the trials were convicted Under Sections 447/427. Separate sentences of fine were passed in respect of offences they were found guilty of.

3. The prosecution case was that the complainant Jara Singh purchased 9 Bighas of land from one Leleu Lalung a few months before the occurrence. Before purchasing the land the complainant was in possession as a mortgagee. He had cultivated the land and transplanted paddy on one Bigha of it. Another two Bighas were ready for transplantation.

The accused damaged the complainants transplanted paddy and themselves transplanted paddy on about two Bighas of land. The accused denied the charge. Their defence was that they were in occupation of the land in question in their own right and that they did not damage any paddy belonging to the complainant.

4. The prosecution examined 5 witnesses. One witness was examined on behalf of the accused. The prosecution witnesses were examined and cross-examined on 12-9-1952. The case was adjourned to 22-10-1950 for the statement of the accused and for examination of defence witnesses, if any.

On 22nd October one defence witness was examined. The statement of the accused was also recorded on that date. Arguments were then heard and the accused were convicted.

Before the learned Sessions Judge it was argued on behalf of the petitioners that the procedure provided for in Section 256, Criminal P. C. had not been followed and the contravention vitiated the entire trial. The learned Sessions Judge finding that there was conflict of authority on this point has referred the case to this Court. He has not given any decision on the facts of the case.

5. Chapter 22 of the Criminal P. C. contains provisions which regulate summary trials. Section 262 provides that in trials under the chapter (Chapter 22) the procedure prescribed for summons-cases shall be followed in smmnors cases, and the procedure prescribed for warrant cases shall be followed in warrant-cases, except as hereinafter mentioned.

In regard to cases in which no appeal lies, the exceptions to Section 262 (1) have to be gathered front the provisions contained in Section 263. It is that provision of the chapter which dispenses with certain requirements of procedure relating to trial of warrant cases. It provides that

in cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter in such form as the Provincial Government may direct the following particulars

(f) the offence complained of and the offence (if any) proved, and in cases coming under clause (d), clause (e), clause (f), or clause (g) of Sub-section (1) of Section 260 the value of tie property in respect of which the offence has been committed;

(g) the plea of the accused and his examination (if any);

(h) the finding, and, in the case of a conviction, a brief statement of the reasons therefor;

(i) the sentence or other final order; and

(j) the date on which the proceedings terminated.

6. The section brings out 2 exceptions clearly. One is that it is not necessary to record the evidence of witnesses, the other is that no formal charge need be framed, in cases where no appeal lies. The plea of the accused has got to be recorded and also his examination, if any.

Section 263 if construed strictly does not dispense with the requirements of Section 256, Criminal P, C. Its applicability to this case is undoubted. It is a case in which no appeal lay, no formal charge was framed. Section 264 does not come into operation and it is difficult to read in Section 263 an intention on the part of the Legislature to take away the obligation that Section 256 imposed on the Court.

7. Section 256 requires that

if the accused refuses to plead, or does not plead, or claims to be tried, he shall be required to state, at the commencement of the next hearing o the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken,....

This section has to be read with Sections 253, 254 and 255. In Section 254 it is laid down that

if, upon taking all the evidence referred to in Section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.

But if a prima facie case is made out, a charge has to be framed u/s 254.

The charge when framed has to be read and explained to the accused. The Court has to ask whether he is guilty or he has any defence to make. If he pleads guilty, the Magistrate has to record that plea and may in his discretion convict him thereon, vide Section 255. If he refuses to plead, or does not plead, or claims to be tried, he shall be required to state, at the commencement of the next hearing of the case or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether lie wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken, vide Section 256.

The requirement of Section 262 is that the procedure applicable to warrant cases has to be followed in the summary trials of warrant cases. The exceptions are in regard to the recording of evidence and the framing of the charge, The framing of a

formal charge is not necessary. The use of the word "formal" is significant. What is dispensed with is the mere formality of a written charge. The recording of the plea is obligatory. The implication of the require-ment is that the accused should have some idea of the offence which emerges from the statement of the prosecution case. It would be necessary briefly to convey it to him. The need for it is more clearly indicated when the evidence discloses an offence different from that for which an accused is being prosecuted.

The recording of the plea brings in by necessary implication the requirement that the provision contained in Section 256 shall be followed, for the prosecution evidence for all practical purposes serves as a substitute for a formal charge. This leads to the conclusion that the requirement of Section 256 (2) has to be fulfilled and the mere fact that the trial is summary, does not entitle the Court to ignore it. The accused still has to be asked at the next hearing after his plea is recorded or forthwith whether he wishes to cross examine any of the prosecution witnesses.

8. If it is held that it is not necessary in a summary trial where no appeal lies to follow the provisions contained in Section 256, the accused would be deprived of a very valuable right. The procedure provided for trial of warrant cases gives the accused two opportunities for cross-examining prosecution witnesses. He may cross examine them when witnesses first appear. But he is under no obligation to do so. At that stage he may not cross examine. After the charge is framed, he may ask that all be re-summoned for cross examination.

On the other hand, he may cross examine them in the first instance and he may also avail of the opportunity of further Cross examination after the charge is framed. In a summary trial, if Section 256 is not applied, the result will be that the accused will be compelled to cross examine them when they first appear without any further right and yet this is not obligatory on him according to the procedure provided for the trial of warrant cases. All tills cannot be read in Section 263.

If the intention of the Legislature had been to deprive the accused of such a valuable right, it would have been brought out clearly. It follows therefore that even in summary trials where no appeal lies and no formal charge is necessary, the provisions of Section 256 have to be followed.

9. There is no doubt some divergence of judicial opinion on the point. But the consensus of authority seems to be in favour of the view that Section 256 applies to warrant cases tried summarily in which no charge is framed. "Nepal Bagdi v. Emperor" AIR 1920 Cat 769 ; Kamala Kanta Ghosh and Another Vs. Emperor, ; " Amaresh Chandra Sinha Vs. Emperor, "Rai Mohan Mondal v. Narmada Dasi" 53 Cal WN 877 ; "Allipuram Subbiah v. Venkata Subbamma" AIR 1942 Mad 672 ; "Munna v. Emperor" AIR 1939 Nag 87 ; "Tittu Sahu v. Emperor" AIR 1920 Pat 492 and "Shidu v. Emperor" AIR 1930 Sind 146 (H) all support this view.

The contrary view has been taken in Umaji Krishnaji Sonavni Vs. Emperor, and also in "Gokaian v. Emperor" AIR 1932 Oudh 242 . Both these were considered in AIR 1939 Nag 87 referred to above. I am in respectful agreement with Grille J. that absence of a formal charge does not necessarily involve the absence of a plea and the plain language of Section 262 leads to the conclusion that the accused is entitled to have prosecution witnesses recalled.

The ratio of the Bombay and the Lucknow decisions is that when no charge is necessary, Section 256 does not come into play. This may be a possible view. But Fawcett j. in Umaji Krishnaji Sonavni Vs. Emperor, observed that the provisions of Section 256 could be followed even if no charge was framed. I respectfully agree.

In these circumstances the better view definitely is which avoids depriving the accused of a light so valuable for purposes of defence. He is not deprived of this right in express terms by Section 263 and I find it difficult to subscribe to the position that the fact that no "formal" charge is necessary, excludes the application of Section 256 by necessary implication.

I am in respectful agreement with the view taken in the majority of the High Courts that Section 256 is applicable to summary trials of warrant cases even if where no formal charge is necessary. My answer to the first question raised in the reference therefore is in the affirmative.

10. So far as the second question is concerned I am inclined to the view that failure to comply with the requirements of Section 256 is not such a contravention of the law or an illegality that it should vitiate the trial without reference to the question whether the accused has been prejudiced.

Under Section 537 no findings, sentence or order may be reversed or altered on appeal or revision on account of any error, omission or irregularity etc. unless the error, omission or irregularity has in fact occasioned a failure of justice. All errors, omissions and irregularities are included. The section in terms makes no distinction between irregularities and illegalities.

The accused has the right to waive the privilege given to him u/s 256. The proceedings in a particular case may show that no prejudice at all was caused by the failure to comply with the re-| quirements of Section 256. In such cases the proceedings should not be vitiated merely because of the non-compliance with the requirements of Section 256.

I am not oblivious of the fact that even on this point there is some conflict of judicial opinion. But recent authorities seem to be inclined to the view that the omission or the contravention of Section 256 is a curable irregularity. By itself it would not suffice to vitiate the proceeding. In "Munian Chetty v. Emperor" AIR 1915 Mad 883 it was held that

a failure to ask the accused, after framing the charge, whether he is willing to cross-examine the prosecution witnesses again, is a mere irregularity and the conviction is not thereby vitiated.

In Umaji Krishnaji Sonavni Vs. Emperor, the same view was expressed. In Golam Mahiuddin Vs. Hrishikesh, also Section 537 was applied and the decision of the learned Magistrate was not interfered with on the ground that no prejudice could be said to have been caused.

In Hazara Singh and Another Vs. Emperor, the Magistrate did not wait until the commencement of the next hearing. He asked the question whether the accused wished to cross-examine any of the prosecution witnesses on the very day he framed the charge. But he did not record his reasons for adopting this course. In the order sheet he noted that day that the accused persons had to be despatched to Calcutta for another trial, that is to say, that there was urgency. It was held that the non-compliance with the requirements of Section 256 was only technical and could not be said to have prejudiced the accused.

Their Lordships of the Privy Council in AIR 1927 44 (Privy Council) distinguished the case of ''Subrahmania Iyer v. Emperor'' 25 Mad 61 , in the following terms :

The distinction between that case and the present is fairly obvious. The procedure adopted was one which the Code positively prohibited, and it was possible that it might have worked actual injustice to the accused.

The view expressed in this case has been the basis of a large number of cases which hold that the Code makes no distinction between illegalities and irregularities and the criterion in every case is whether there has been a failure of justice. The breach of a provision even though mandatory cannot be said to be an illegality necessarily vitiating the proceeding, though it may not be said that all contraventions of the provisions of the Code are of equal importance. They cannot be treated alike.

There may be a contravention of a positive prohibition regarding the mode of a trial and the inference may well be that prejudice has occurred. The trial in that case may be vitiated. But the basic test would be whether there has been a failure or miscarriage of justice by the error, omission or irregularity complained of. The test laid down in ''Abdul Rahman''s ease (N) would support to view taken in the cases to which reference has been made above.

11. Mr. Sarma has relied on 53 Cal WN 877 ; Kamala Kanta Ghosh and Another Vs. Emperor, and Amaresh Chandra Sinha Vs. Emperor, These cases lay down that Section 256 does apply to summary trial of warrant cases. 1 have come to the same conclusion.

In 53 Cal WN 877 , there was nothing to show that the plea of the accused was taken in accordance with the provisions of Section 255 of the Code. After the plea the Magistrate trying the case insisted on the accused cross-examining the witnesses

for the prosecution immediately alter the . plea and thus contravened the provisions of Section 256 also. He gave no explanation for the course he had adopted. In these circumstances the trial was set aside.

But the question whether any failure of justice had occurred or whether prejudice had been caused, was not raised or considered. The case did not involve merely a contravention of Section 256. There was the absence of the plea, which had to be recorded u/s 255.

12. In Kamala Kanta Ghosh and Another Vs. Emperor, the order of conviction was set aside as the trial Magistrate had failed to carry out the provisions of Section 256, Criminal P. C. in substance. .In Amaresh Chandra Sinha Vs. Emperor, it was observed that it was necessary that the accused should have been charged but in fact he was not charged. The plea did not bear any date. There was nothing to show that the accused was examined u/s 342. This case is of no assist- ance though it appears that in Kamala Kanta Ghosh and Another Vs. Emperor, the provisions of Section 256 were regarded as mandatory in their application to summary trials.

But even in that case the question whether the contravention was curable when no failure of justice had occurred, was not considered. Mr. Sarma has argued that where provisions are mandatory and are not complied with, the conviction would be vitiated. It appears to rite that the question is concluded by the decision of their Lordships of the Privy Council in ''PLilukuri Kottaya v. Emperor'' AIR 1947 PC 67 . In this case their Lordships observed as follows :

There are, no doubt, authorities in India which lend some support to Mr. Pritt''s contention, and reference may be made to Tirkha and Another Vs. Nanak and Another, in which the Court expressed the view that Section 537, Criminal P. C. applied only to errors of procedure arising out of mere inadvertence, and not to cases of disregard of, or disobedience to, mandatory provisions of the Code, and to ''Maruda Muthu Vannian v. Emperor'' AIR 1922 Mad 512 , in which the view was expressed that any failure to examine the accused u/s 342, Criminal P. C, was fatal to the validity of the trial and could no be cured u/s 537.

In their Lordships'' opinion this argument is based on too narrow a view of the operation of Section 537. When a trial is conducted in a manner different from that prescribed by the Code (as in ''Subrahmania Iyer''s case (O)), the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured u/s 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their Lordships'' Board in ''Abdul Rahman v. Emperor (N)'', where failure to comply with Section 360, Criminal

P. C. was held to be cured by Sections 535 and 537.

This decision may be taken to have set the controversy at rest. It follows from it that even though there may be a breach of a mandatory provision, the proceeding will not necessarily be vitiated. In order that such a result should follow, the error, omission or irregularity should have in fact occasioned a failure of justice. Even if the provision of Section 256 may be regarded as mandatory, the conviction need not be set aside for that reason alone.

With profound respect for the view of the learned Judges expressed in Kamala Kanta Ghosh and Another Vs. Emperor, I feel that every failure to comply with requirements of Section 256 by itself and without reference to the question of prejudice is not fatal to the trial, though in many cases in which the right of further cross-examination is not conceded or is denied, it may be difficult to say that no prejudice has been caused. My answer to the 2nd question therefore is that the failure to offer an opportunity to the accused to1 recall witnesses u/s 256 would be a curable omission if no failure of justice has actually occurred.

13. The learned Judge has not given any decision on facts. This case therefore shall go back to him for its decision on the merits. It will be for him to consider whether any prejudice has been caused to the accused by reason of the failure on the part of the Magistrate to comply with the requirements of Section 256.