(1924) 07 CAL CK 0014

Calcutta High Court

Case No: None

Hira Lal Ghosh		APPELLANT
	Vs	
Emperor		RESPONDENT

Date of Decision: July 10, 1924

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 360

Citation: 83 Ind. Cas. 905

Hon'ble Judges: Newbould, J; Mukerji, J

Bench: Division Bench

Judgement

Newbould, J.

The question we have to decide is whether an omission by a Court to comply with the provisions of Section 360, Criminal Procedure Code, vitiates the trial. The provisions of the section are mandatory, and in the case of two witnesses these provisions were totally disregarded. The test to be applied in deciding "whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience" is to be found in the judgment of Lord Penzance in the case of Howard v. Bodington (1877) 2 P.D. 203 following the conclusion expressed by Lord Campbell when sitting as Lord Chancellor in the case of the Liverpool Borough Bank v. Turner (1860) 30 L.J.Ch 379 : 2 De.C.F. & J. 502 : 7 Jur. (N.S.) 150 : 3 L.T. (N.S.) 194 : 9 W.R. 292 : 129 R.R. 172 : 45 E.R. 715 to which reference was made by the learned Chief Justice of this Court in Government of Assam v. Sahebulla 75 Ind. Cas. 129 : 51 C. 1 : 38 C.L.J. 77 : 27 C.W.N. 857 : 24 Cri.L.J. 881 : AIR(1921) (C.) 1. "In each case you must look to the subject-matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory". The general object to be secured by Chapter XXV of the Code, which includes Section 360, is to ensure the accuracy of the record, and also that the

accused should know and understand what evidence is given at the trial. The reading over the evidence to the witness is so essential to the framing of an accurate record that I feel bound to hold that the direction in Section 360 that the evidence shall be read over to the witness is imperative and not only directory. It follows, therefore, that the omission to read over their evidence to these two witnesses was an illegality which vitiated the trial. It is not necessary to consider whether this omission has in fact caused a failure of justice, since Section 537 can have no application.

2. We have reason to believe that the practice which was condemned by Jenkins C.J. in 1909 when delivering his judgment in Jyotish Chandra Mukerjee v. Emperor 4 Ind. Cas. 416 : 36 C. 955 : 14 C.W.N. 82 : 10 Cr.L.J. 581, still continues. We anticipate that the result of our decision-in this case may have serious consequences, but that is no reason why we should fail in our duty to insist that the Subordinate Criminal Courts should hold their trials in accordance with the clear provisions of the Code of Criminal Procedure.

3. Before the last amendment of this Code, in the Statement of Objects and Reasons attached to the first Draft Bill (III of 1914), the following passage occurs--"At present it is believed that Section 360, which requires the Court to read over the evidence of each witness to him in the presence of the accused or his Pleader, is not always observed in practice and occasions unnecessary inconvenience. The amendment (i. e., clause 83 of the Bill) provides accordingly for a witness reading over his deposition himself, and further that the deposition need only be read in the presence of the accused if the accused so desires." In the Bill introduced in the Imperial Legislative Assembly on 20th September 1917 this clause was omitted. This Court, when consulted on the Bill, strongly urged that Section 360 of the Code be amended as was suggested by clause 83 of the Bill as originally framed. The Legislature having deliberaetly decided that the inconvenience caused by the provisions of this section did not justify an alteration of the law on this point is a further reason, if any is necessary, why we should insist on a strict observance of this clear provision of the law.

4. I have had the advantage of reading the judgment my learned brother is about to deliver. As I am in agreement with the views expressed by him, I have thought it unnecessary to refer, in my judgment, to other points that were argued before us.

5. The Rule is made absolute. The conviction of the petitioner and the sentence passed on him are set aside, and we direct that he be re-tried according to law.

Mukerji, J.

6. Provisions corresponding to those contained in Section 360 of Act V of 1898 have been on the Statute Book ever since the Code of Criminal Procedure came into existence in 1861. The section corresponds to the section bearing the same number in Act X of 1882 and to Section 339 of Act X of 1872 and appeared in Act XXV of 1861

as Section 193. In the last mentioned Act there was a provision contained in Section 199 for attaching a memorandum to the evidence of each witness, signed by the Magistrate and stating that the evidence was read over to the witness in a language which he. understood, naming the language in which it was explained, and if the fact was so, that the witness had acknowledged the evidence to be correct; and when the evidence had not been taken down by the Magistrate with his own hand, the memorandum was to further state that the evidence was taken down in the presence and hearing of the Magistrate and under his personal direction and superintendence. This provision was subsequently repealed, and a memorandum is no longer necessary. Under the Codes of 1861 and 1872 the evidence was to be read over, when the personal attendance of the accused was dispensed with, in the presence of his agent, while later on the word "agent" was substituted by the word "Pleader." Under the Codes of 1861 and 1872, if the evidence was taken down in a language different from that in which it was given and the witness did not understand the language in which it was taken down the witness might require the evidence to be interpreted to him in the language in which it was given or in a language which he understood; by the Act of 1882 it was enacted that the evidence so taken as aforesaid was to be interpreted in that way, and the necessity of a request on the part of the witness was done away with. In spite of a proposed amendment the law has undergone no alteration in the amendments effected by Act XXIII of 1923.

7. Sub-section (1) of Section 360 provides that the evidence shall be read over to the accused or his Pleader and shall, if necessary, be corrected. Evidently such correction may be made at the instance of the Court itself or of the accused or his Pleader or anybody else; there is no restriction on that score. Sub-section (2) deals with corrections or memorandum to be made where the witness denies the correctness of the record. Sub-section (3) makes a provision so that the witness-may understand what has been recorded, If the provisions of this section, as well as of Section 361 are strictly observed, the, accused as well as the witness will understand exactly what the evidence has been, and will be in a position to see that a correct record has been made of it. Apart from omissions or inaccuracies that may occur in making the record, a witness, when the evidence is read over to him, may some times desire to supplement his answer or modify it or explain the sense of it. Before a deposition is closed a witness should be given an opportunity of explaining and correcting any contradictions it may contain, and only the statement which the witness finally declares to be the true one must be taken to be the statement he intended to make. The accused should not be deprived of the benefit of this opportunity being given to the witness. Moreover, if any corrections or alterations or additions are to be made, it is only fair that they should be made to the knowledge of the accused, for it may sometimes happen that he may have something to say as to why they should or should not be made. These considerations lead me to dissent from the view that has sometimes been taken to

the effect that Section 360, Criminal Procedure Code, was enacted only...for the protection of the witness. That undoubtedly was one of the objects but the other object, namely, to safeguard the interests of the accused is equally clear from the wording of the section itself.

8. The wording of the section is mandatory. The object of the provisions being to ensure the accuracy of the record, and also that the accused should know and understand the evidence that is given at the trial, the provisions must be held to be obligatory and not merely directory. In the case of Jyotish Chandra Mukerjee v. Emperor 4 Ind. Cas. 416 : 36 C. 955 : 14 C.W.N. 82 : 10 Cr.L.J. 581 a Sessions Judge refused to follow the provisions of the section on the ground that it would involve a great waste of time and observed: "The section seems to me directory and not obligatory. If the witness detects a mistake he can come back and say so. This is the universal practice in Sessions Courts, my experience extending to about six such Courts," Optima est legum interpres consutuedo. Sir Lawrence Jenkins, C.J., observed that he did not agree with the view, for the custom indicated by the learned Judge could not alter the plain words of the Act.

9. The failure to comply with the provisions of the section affects both the witness and the accused, as indicated above : and the effect of such failure or non-compliance may be judged from two distinct points of view, viz., as affecting the witness himself and as affecting the accused.

10. So far as it affects the witness in a subsequent trial of the witness himself, arising out of the deposition so recorded, there is some conflict of judicial opinion as regards the effect of a failure to observe the strict provisions of this section. A tendency is seen in some of the rulings to disregard an informality or irregularity, which, however patent, is not calculated to throw doubt upon the authenticity of the deposition, especially where the witness has admitted its correctness and has not been prejudiced by the omission to comply strictly with the provisions. In cases, however, were all the guarantees of authenticity, which the law prescribes, have been violated, there is a consensus of opinion that the deposition will not be admitted in evidence. As instances of the former class may be quoted the cases of Rakhal Chandra Laha V. Emperor 2 Ind. Cas. 697 : 36 C. 808 : 9 C.L.J. 690 : 13 C.W.N. 942 : 10 Cri.L.J. 150 and In Re: Bogra 7 Ind. Cas. 414 : 34 M. 141 : 8 M.L.T. 117 : (1910) M.W.N. 435 : 11 Cri.L.J. 482 : 20 M.L.J. 943. As instances of the latter class may be cited the cases of Emperor v. Jogendra Nath Ghose 24 Ind. Cas. 571 : 42 C. 240 : 18 C.W.N. 1242 : 15 Cri.L.J. 483 and Mohendra Nath Missier v. Emperor 12 C.W.N. 845 : 8 Cri.L.J. 116. So far as the witness himself is concerned the considerations which arise are of a wholly different character from those which arise in the case of the accused and they need not be referred to here. Nor again is it profitable to refer to the authorities which deal with the effect of non-compliance with the provisions of Order XVIII, Rule 5, Civil Procedure Code.

11. Turning now to the effect of the non-compliance of the provisions. as against the accused, it is obvious in the first place that such non-compliance deprives the accused of a very valuable right which the law secures for Mm. In requiring that the reading over shall be done in the presence of the accused or his Pleader the Legislature obviously intended to give the accused or his Pleader an opportunity of checking the correctness of the deposition. That this was the intention has been held by this Court in the case of Emperor v. Jogendra Nath Ghose 24 Ind. Cas. 571 : 42 C. 240 : 18 C.W.N. 1242 : 15 Cri.L.J. 483. In that case the record had been handed over to a witness to read the deposition after it had been recorded and this Court observed as follows: "We are of opinion that that is not a sufficient compliance with the provisions of Section 360, Sub-section (1), of the Criminal Procedure Code, inasmuch as that sub-section requires that the evidence should be read over in the presence, that is, in the hearing of the accused in order that the accused should have an opportunity of correcting any mistake in it." That being so, failure to comply with the provisions may deprive the accused of advantages which may accrue to him by the observance thereof. In the case of Queen v. Issur Raut 8 W.R.Cri. 63 where under the Code of 1861, the Magistrate had recorded in English the depositions of witnesses given in the vernacular, the witnesses not understanding English, and there was no memorandum such as was required by Section 199 of the Act that the despositions had been explained to the witnesses in a language which they understood, this Court (Kempand Glover, JJ.,) observed as follows: "Such being the case the evidence was not recorded as the law directs. We are also unable to understand how the prisoners could cross-examine witnesses, whose evidence-in-chief was taken down in a language foreign to the accused, and of which no attempt at explanation was made. There has, therefore, been an error in law in the procedure of the case by which the accused have been materially prejudiced, and this Court, acting as a Court of Revision quashes the trial and sentence, and directs the prisoners be discharged. We also direct the Sessions Judge to call the attention of the Cantonment Magistrate to the provisions of the Code of Criminal Procedure which relate to the examination of witnesses and accused parties, and to. enjoin upon him a strict observance of these provisions which are the only guarantee this Court can have that the examination is conducted fairly and properly." In In the matter of Mahesh Chandra Banerjee 4 B.L.R. App. 1 at p. 11 : 13 W.R.Cr. 1, Norman J., refrained from expressing any opinion as to the correctness or otherwise of the above decision observing as follows: "I may say, however, that I should require to consider the case further before I could fully assent to the ruling on this subject in Queen v. Issur Raut 8 W.R.Cri. 63." In the case of In Re: Okhoy Kumar 7 C.L.R. 393 Garth, C.J., and Maclean, J., held that Section 339 of Act X of 1872 being for the protection of witnesses only, the fact " that witnesses did not understand their deposition when read over, although they may not have required them at the time to be interpreted, affords no grounds for an application by the accused to set aside a conviction. The case of Queen v. Issur Raut 8 W.R.Cri. 63 does not appear to have been brought to the notice of the learned Judges who decided

the case of In re, Okhoy Kumar 7 C.L.R. 393. Moreover, it would appear that in that case the depositions were in point of fact read over in English, and the Pleader for the prisoners, and one of the prisoners himself understood English. There was, therefore, a compliance with a portion of Section 339 while the last part of it which enabled the witnesses to require the depositions to be translated in a language which they understood, was not complied with, "but in fact, there was no such requisition by the witnesses. The language of this part of the section which corresponded to Sub-section (3) of Section 360 of Act V of 1898 was widely different as has already been pointed out. The Madras High Court (Collins, C.J., and Parker, J.,) in the case of In Re: Singiri Eradu 2 Weir 435 set aside the acquittal of an accused on the ground that the trial was vitiated by a material irregularity when the deposition of each witness was read over to him while the examination of the next witness was proceeding, it being held that under the circumstances the accused could not pay attention to the evidence so read over. This decision was referred to by Miller, J., in the case of In Re: Bogra 7 Ind. Cas. 414 : 34 M. 141 : 8 M.L.T. 117 : (1910) M.W.N. 435 : 11 Cri.L.J. 482 : 20 M.L.J. 943 and it was observed as follows.--"It was held by Collins, C.J., and Parker, J., in In Re: Singiri Eradu 2 Weir 435 that procedure identical with that adopted by the Sessions Judge in the present case is materially irregular. The deposition taken in the Sessions Court was, therefore, irregularly taken and it may be that a conviction based upon such evidence could not be sustained." In the case of Rakhal Chandra Laha v. Emperor 2 Ind. Cas. 697 : 36 C. 808 : 9 C.L.J. 690 : 13 C.W.N. 942 : 10 Cr.L.J. 150 where the deposition of a witness was read over in the presence of one out of several accused persons, Jenkins, C.J., and Mookerjee, J., observed as follows: "In the case before us, so far at least as one of the original accused persons was concerned, the depositions was read over in the presence of his Pleader, and was undoubtedly admissible in evidence as against that accused." In the case of Jyotish Chandra Mukerjee v. Emperor 4 Ind. Cas. 416 : 36 C. 955 : 14 C.W.N. 82 : 10 Cri.L.J. 581 Jenkins, C.J., held that the omission to read over the depositions u/s 360, Criminal Procedure Code, under the special circumstances of that case, was not fatal. It does not appear from the report what those special circumstances were; but it is evident from the judgment itself that objection on the ground of non-compliance was taken on behalf of the Crown and it does not appear that the accused relied upon it as a ground of their appeal.

12. There is, therefore, abundant support for the proposition that the accused is vitally interested in the due compliance with the provisions of Section 360, Criminal Procedure Code, and failure in that respect amounts to a material irregularity which ordinarily must be taken as causing him prejudice. Such a material irregularity proceeding from the disregard of the express provision of the law, is, in my judgment, nothing short of an illegality, and, as such not curable u/s 537, Criminal Procedure Code. The same view has been taken in the case of Haro Nath Malo v. Allah Bux 76 Ind. Cas. 961 : 26 C.W.N. 119 : 38 C.L.J. 281 : AIR (1924) (C)182 : 25 Cri.L.J. 289 where the depositions were not read over to the witnesses at all on the ground

that it was not the practice to do so except in "Sessions triable cases."

13. In the case before us the evidence was not read over to the witnesses at all. The depositions of five of the prosecution witnesses bear at their foot the signatures of the witnesses, and we are asked to presume from those signatures alone that the witnesses had actually read the depositions before they put their signatures down; and as regards two of the prosecution witnesses their signatures even do not appear, and it is admitted that, so far as their depositions are concerned, there was no attempt made to comply even with the spirit of the section. There is, therefore, no escape in the present case, from the conclusion that the whole trial was conducted in utter disregard'' of the imperative provisions of the law as contained in Section 380, Criminal Procedure Code and was, therefore, a nullity.

14. I accordingly agree in the order passed by my learned brother that the Rule should be made absolute, the conviction of and the sentence passed on the petitioner set aside and the petitioner tried again in accordance with law.