Nurmahomed Kadarbhai Vs Emperor

Court: Bombay High Court

Date of Decision: July 16, 1930

Acts Referred: Criminal Procedure Code, 1898 (CrPC) â€" Section 162, 537

Citation: AIR 1930 Bom 595 : 129 Ind. Cas. 156

Hon'ble Judges: J.W.F. Beaumont, C.J; Madgavkar, J

Bench: Division Bench

Judgement

J.W.F. 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.

2. 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 u/s 395, which deals with dacoity.

3. 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 u/s

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.

4. 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 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 Chap. 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.

5. 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 provision of Section 162 is not an irregularity, which can be cured u/s 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. Sub-ramania Iyer v. King Emperor 28

I.A. 257 : 3 Bom. L.R. 540 : 25 M. 61 : 11 M.L.J. 233 : 5 C.W.N. 866 : 2 Weir. 271 : 8 Sar. 160. 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 lees 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 35 C. 61 : 11 C.W.N. 1011 : 6 C.L.J. 320 where Mr.

Justice Mookerjee says thus (page 72 Page of 35 C.--[Ed.]):

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 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, he wever, is well established, and is often useful; as was observed by Mr. Justice Coleridge in he

lmes v. Russell (1841) 9 Dowl. 487 "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".

6. If you apply that test here, the defendants could, I think, have waived the prohibition against using the statements to the Police. The other case in

which the general principle is discussed in Emperor v. Bechu Chaube 71 Ind. Cas. 115 : 45 A. 124 : 20 A.L.J. 874 : AIR 1922 All. 81 : 24

CrI.L.J. 67. Mr. Justice Stuart remarks (page 126 Page of 45 A.--[Ed.]):

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.

7. 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 fail"s and is dismissed.

Madgavkar, J.

8. 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 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 contention.

9. 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 clients'' 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, he wever, 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 106 Ind. Cas. 100 : 29 Bom. L.R. 996 : AIR 1927 Bom. 501 : 8 A.I. Cr. R.

324 : 28 CrI.L.J. 1012 curable u/s 537 of the Code of Criminal Procedure. I agree that the application should be dismissed.

10. 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.