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**(1929) 07 BOM CK 0036**

**Bombay High Court**

**Case No:** None

Genu Gopal and Another

APPELLANT

Vs

Emperor

RESPONDENT

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**Date of Decision:** July 8, 1929

**Acts Referred:**

- Criminal Procedure Code, 1898 (CrPC) - Section 342
- Penal Code, 1860 (IPC) - Section 323

**Citation:** 122 Ind. Cas. 424

**Hon'ble Judges:** Wild, J; Patkar, J

**Bench:** Division Bench

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**Judgement**

Patkar, J.

In this case the three accused were tried on a charge u/s 323, Indian Penal Code, and convicted and sentenced each to pay a fine of Rs. 25 by the Special Magistrate, First Class, Poona. The learned Sessions Judge of Poona has made a reference to this Court recommending that the conviction and sentence passed by the Magistrate should be quashed as the trial was vitiated by failure to examine the applicants u/s 342 of the Criminal Procedure Code.

2. It appears that the witness, Ex. 1, was examined on October 25, and three other witnesses on behalf of the prosecution, Exs. 2, 3 and 4, were examined on November 1, 1928, On that day the learned Magistrate asked the accused whether they beat the complainant on Sunday September 30, 1928, at 11 a. m. The accused replied in the negative. After the statements of the accused were taken a charge u/s 323 was formed against the accused and they were asked whether they pleaded guilty to the charge. The accused having replied in the negative, the case was adjourned to November 9, 1928. On November 9, the accused were asked whether they wished to further cross examine the witnesses and they answered in the affirmative, and the case was adjourned to November 27, 1928. On that day they

were asked whether they wished to further cross-examine the witnesses. They replied in the negative and said that they were going to give a list of their witnesses. On December 4, 1928, three of the witnesses on behalf of the defence were examined and two more were examined on December 13. Before the learned Sessions Judge the Public Prosecutor admitted that it was clear from the record that after the charge was framed the Magistrate had not examined the accused u/s 342 of the Criminal Procedure Code.

3. u/s 342 of the Criminal Procedure Code for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary. This is a discretionary power which the Court may exercise at any time during the trial or inquiry even before the framing of the charge, but under the latter part of Section 312 it is obligatory on the Court for the purpose aforesaid to question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. u/s 255 of the Criminal Procedure Code, the charge shall be read and explained to the accused and he shall be asked whether he is guilty or has any defence to make. The question put to the accused on November 1, 1928, was under the first part of a. 342 before the charge was framed. After the charge was framed they were asked whether they pleaded guilty u/s 255, and having replied in the negative, at the next hearing they were asked u/s 256 of the Criminal Procedure Code whether they wished to cross-examine any, and if so, which of the prosecution witnesses. The accused said that they wished to cross-examine the witnesses on behalf of the prosecution and the case was adjourned to November 27. On November 27, they stated that they did not wish to cross examine the prosecution witnesses. Then the stage was reached u/s 256 when the accused would be called upon to enter on his defence and produce his evidence, and "before he is called upon to enter upon his defence" which means the same thing as "before he is called on for his defence," it is obligatory on the Court under the latter part of Section 342 to question the accused generally on the case after the witnesses for the prosecution have been examined. The stage then for calling upon the accused to explain the circumstances appearing in the evidence against him under the latter part of Section 342 would be reached when after the charge is framed the accused either declines to cross-examine the prosecution witnesses, or when he expresses a wish to cross-examine and the cross examination and re-examination is finished, and the evidence of the remaining witnesses for the prosecution has been taken. In the present case there were no further prosecution witnesses to be examined and though the accused on November 9, 1928, stated that they wished to further cross-examine the prosecution witnesses, they declined to do so on November 17, 1928. In my opinion the stage of questioning the accused under s 312 generally on the case was not reached till November, 27, 1928, when the accused declined to further cross-examine the prosecution witnesses and before they were called on to

enter upon their defence, The examination and cross-examination of the prosecution witnesses-was no doubt complete on November 1, 1928, and the accused were asked the question whether they assaulted the complainant, and after that examination no further prosecution witnesses were either examined or cross-examined, and it may be said that the accused are not prejudiced by the failure of the Court to question them generally on the case under the latter part of Section 342.

4. In *Fernandez v. Emperor* 59 I C 129 : 45 B. 672 : 22 Bom. L.R. 1040 it was held that u/s 342 of the Criminal Procedure Code a Magistrate is bound in a summons case to examine the accused before convicting him. In a summons case u/s 242 of the Criminal Procedure Code when an accused appears or is brought before a Magistrate he shall be asked why he should not be convicted. Notwithstanding the examination u/s 242, it is obligatory to examine the accused again u/s 342 of the Criminal Procedure Code. It was held that the omission to comply with the section must necessarily attract the same consequence even in a summons case as in other trials and that the illegality vitiates the proceedings. In *Emperor v. Nathu Kasturehand Marwadi* 86 I C 66 : 50 B. 42 : 27 Bom. L.R. 105 : AIR 1925 Bom. 170 : 26 Cr.L.J. 690 it was held that in a warrant case the stage in the trial prescribed by Section 312 of the Criminal Procedure Code when the accused has to be questioned generally on the case for the prosecution is after the prosecution evidence is complete, that is to say, after the accused against whom a charge has been framed has cross-examined the witnesses for the prosecution. Macleod, C. J , held (page 46 Page of 50 B.-[Ed]):

The Code intends that the accused shall be given an opportunity of explaining any circumstances appearing in the evidence against him. That must mean the whole of the evidence against him, and any examination u/s 342 before that evidence is closed cannot possibly fulfil the conditions of the section.

5. In that case after the prosecution witnesses had been examined, a charge was framed against the accused, and the witnesses who were previously examined were cross examined, but the accused was not questioned further and he entered on his defence. The present case differs from *Nathu Kasturchand*'s case 86 I C. 66 : 50 B. 42 : 27 Bom. L.R. 105 : AIR 1925 Bom. 170 : 26 L.J. 690 in this respect that after the charge was framed the prosecution witnesses were not further examined or cross-examined. In that case Crump, J., observed as follows (page 47):

Now the section says that such examination shall for the purpose aforesaid be made after the witnesses for the prosecution have been examined and before the accused is called on for his defence. That examination must therefore, come immediately between the two stages so indicated. It seems, therefore, to me that up to the stage indicated by the words "before the accused is called on for his defence," it is obligatory on the Magistrate to question the accused as regards any circumstances appearing against him, and, therefore, as regards any evidence which may have

been recorded up to that point. Therefore, we have to determine when that stage is reached, and if reference is made to Section 256,1 think, no doubt can be felt that that stage is not reached until all which is prescribed by that section has been completed.

6. That stage in the present case cannot be said to have been reached till November 27, 1928, when the accused said that they did not wish to further cross-examine the witnesses. The Court, in my opinion, has not, therefore, discharged the obligatory function u/s 342 of the Criminal Procedure Code to question the accused generally before the accused is called on for his defence. Though on November 1, before the charge was framed, the accused may have been asked a question as to whether they assaulted the complainant, it is doubtful whether that question would satisfy the requirements of an examination u/s 342 of the Criminal Procedure Code for the purpose of enabling the accused to explain any circumstances appearing in the evidence against them. Even assuming that the question put to the accused before the framing of the charge satisfied the requirements of Section 342, I think the question was put under the first part of Section 342 when the Court was performing a discretionary function, and, in my opinion, the Court has failed to perform the obligatory function under the latter part of s 342 after the stage for questioning the accused generally on the case under the latter part of Section 342 had been reached on November 27, 1928.

7. It may be that in this particular case there may be no real prejudice to the accused by the omission to question him generally on the case under the latter part of Section 342, but this Court has consistently taken the view that the omission to ask the question is not an irregularity which can be condoned u/s 537 of the Criminal Procedure Code but is an illegality which vitiates the trial. In *Emperor v. Bhau Dharma* 309 IC 359 : 30 Bom. L.R. 385 : AIR 1928 Bom. 140 : 29 C.L.J. 535 it was held that where after the examination of the accused under s 342 of the Criminal Procedure Code, new prosecution witnesses are examined, it is obligatory on the Magistrate to further examine the accused under the section, and that the omission to do so is an illegality which vitiates the trial. To the same effect is the decision in *Gamadia v. Emperor* 91 I.C 949 : 27 Bom. L.R. 1405 : 27 C.L.J. 165 : AIR 1926 Bom. 57 : 50 B. 34; *Varisai Rowther* 73 I C 163 : 46 M. 446 : 44 M.L.J. 567 : 17 L.W. 722 : 32 M.L.T. 385 : (1923) M.W.N. 477 :A.I.R. 1923 Mad. 609 : 24 C.L.J. 547 it was held that if the accused has once been examined u/s 342, it is not obligatory on the Court to question him again after the cross examination and re examination of the prosecution witnesses re-called at the instance of the accused u/s 256 of the Criminal Procedure Code unless some new matter was brought out in the cross examination or re-examination. This view was dissented from in *Emperor v. Nathu Kasturchand Marwadi* 86 I C. 66 : 50 B. 42 : 27 Bom. L.R. 105 : AIR 1925 Bom. 170 : 26 C.L.J. 690 The question in such a case is not whether the accused is prejudiced by the omission of the Court to question the accused but whether there is a disregard of the imperative provisions of Section 342. According to Sir Charles Fawcett in

Emperor v. Bhau Dharma 309 I C 359 : 30 Bom. L.R. 385 : AIR 1928 Bom. 140 : 29 C.L.J. 535 the point may possibly need further examination by the Full Bench in view of the decision of other High Courts and the Privy Council decision in Abdul Rahman v. Emperor 100 I C 227 : 54 I.A. 96 : 29 Bom.L.R. 813 : A.I.R 1927 P.C. 44 : 31 C.W.N. 271 : 25 A.L.J. 117 : (1927) M.W.N. 103 : 38 M.L.T. 64 : 8 P.L.T. 155 : 4 C.W.N. 283 : 28 C.L.J. 259 : 6 B.L.J. 65 Until the point is authoritatively decided by a Full Bench that the omission to examine the accused under the latter part of Section 342 of the Criminal Procedure Code can be treated as an irregularity which can be cured u/s 537 of the Criminal Procedure Code, I feel that I am bound by the decisions of this Court that the omission to examine the accused under the latter part of Section 342 is an illegality which vitiates the trial, and that the examination of the accused before the framing of the charge would not be sufficient to dispense with the examination of the accused after the charge is framed, and after he has either declined to examine the prosecution witnesses u/s 256 or has further cross-examined them.

8. I would, therefore, accept the reference of the learned Sessions Judge, set aside the conviction and sentence passed by the Magistrate and order a re trial of the accused from the point at which the illegality occurred.

Wild, J.

9. The applicants in this case were convicted of simple hurt u/s 323 of the Indian Penal Code and were sentenced to pay a fine of Rs. 25 each. The learned Sessions Judge of Poona has reported this case to us on the ground that the Magistrate failed to question the applicants after the charge was framed and on their intimating that they did not wish to cross-examine the prosecution witnesses after the charge and that the Magistrate, therefore, failed to comply with the provisions of Section 342 of the Criminal Procedure Code.

10. The facts of the case are that on November 1, 1928, the prosecution witnesses were examined, cross examined and re examined. On the same day the applicants were u/s 342 questioned, the charge was framed, and they were asked if they pleaded guilty. They replied in the negative. At the subsequent hearing, on November 9, the applicants were asked if they wished to cross-examine the prosecution witnesses. They replied in the affirmative, but on November 27, they declined to do so and said that they would give a list of defence witnesses" These defence witnesses were examined on December 4 and December 13 and judgment was given on December 14.

11. In his letter of reference the learned Sessions Judge has cited the cases of Fernandez v. Emperor 59 IC 129 : 45 B. 672 : 22 Bom. L.R. 1040: 22 C L.J. 17, Gulabjap v. Emperor 64 I. C. 669 : 46 B. 441 : 23 R.L.R. 1203 : AIR 1922 Bom. 290 and Emperor v. Nathu Kasturchand Marwadi 86 I C. 66 :A.I.R. 1925 Bom. 170 but, in my opinion, these cases have little bearing on the matter in hand as the facts were not the same.

In the above cases the prosecution witnesses were cross-examined after the accused was questioned under p. 342 or the accused was not questioned under that section. Here, however, the applicants were questioned" u/s 342 after all the prosecution witnesses were examined and cross-examined, and as the applicants declined to cross-examine them again after the charge was framed there was in fact no further prosecution evidence about which the applicants could have been questioned.

12. In my opinion the provisions of Section 342 would have been complied with both according to the spirit and letter of the law if the questions put to the applicants had been such as to enable them to explain the circumstances appearing in the evidence against them. As pointed out in *Emperor v. Nathu Kasturehand Marwadi* 86 I C. 66: 27 Bom. L.R. 105 : AIR 1925 Bom. 170 : 26 C.L.J. 690 Page of 50 B.-[Ed.]the intention of the Code is that the accused should be given an opportunity of explaining any circumstances appearing in the evidence against him and this must mean the whole of the evidence. Here the whole of the evidence against the applications had been recorded when they were questioned. The letter of the law is complied with when, as here, the accused is questioned after the witnesses for the prosecution have been examined and before he is called on for his defence. The learned Sessions Judge appears to rely on a remark on page 46 of the case of *Emperor v. Nathu Kasturehand Marwadi* 86 I C. 66 : 50 B. 42 : 27 Bom. L.R. 105 : AIR 1925 Bom. 170 : 26 C.L.J. 690 to the effect that any examination of the accused u/s 342 before the prosecution evidence is closed cannot possibly fulfil the conditions of the section but that remark was made with reference to the case then under consideration and can be considered as an obiter dictum in respect of the present case where the facts are entirely different, I would hold then that if the learned Magistrate had questioned the applicants generally on the case on November, 1, for the purpose of enabling them to explain the circumstances appearing in the evidence against them, his failure to question them again after their refusal to cross-examine the prosecution witnesses would not have been contrary to the provisions of Section 342.

13. As a matter of fact only one question was put to each of the applicants and they were merely asked if on a certain date they had beaten the complainant, It can, therefore, hardly be considered that they were questioned generally on the case nor were they asked their explanation though no doubt they could have volunteered one if they had wished to do so. Section 342 (1) of the Criminal Procedure Code makes it incumbent on the Court to question the accused generally on the case for the purpose of enabling him to explain any circumstances appearing in the evidence against him. Even if the question put to each of the applicants may be considered as a general questioning on the case, the applicants were not given any intimation that it was open to them to give an explanation. They were not asked their explanation nor were they asked if they had anything to say. In view of this omission the applicants had practically no opportunity of explaining the circumstances against them, and, in my opinion, they were never questioned as required by the latter part

of Section 342 (1). I, therefore, agree with my learned brother that the trial is vitated by an illegality and concur in the order proposed.