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FULL BENCH

Before Bhandari, Khosla and Soni, JJ.

DARA SINGH, ALIAS DARI AND OTHERS,—
Convicts-Appellants.

versus

THE STATE,—*Respondent.*

Criminal Appeal No. 121 of 1951.

Code of Criminal Procedure (Act V of 1898)—Section 342—Non-compliance or insufficient compliance with the provisions of—Effect of—Plea raised in appeal—Whether High Court can examine the convict to find out if prejudice caused to him on account of such non-compliance—Fresh trial, when to be ordered.

1951

Sept. 11th

Held, that it is within the powers of the High Court to examine and further examine the convicts and that the law does not place any restrictions upon this power. But if the High Court is of the opinion whether before or after examining the convicts that non-compliance with the provisions of section 342, Criminal Procedure Code, has occasioned or is likely to have occasioned prejudice to the convicts the High Court will order a fresh trial. If, on the other hand, it comes to the conclusion that no such prejudice was caused and no failure of justice was occasioned the appeal will be heard and decided upon merits. With regard to the order of remand this may contain a direction that the trial will proceed from the point where the irregularity occurred or a totally fresh trial may be ordered depending on the facts of that particular case. For instance, if the trial Judge has been transferred a *de novo* trial will be ordered. On the other hand, in some cases the same Sessions Judge may be asked to re-examine the accused and to dispose of the case without holding a completely new trial.

This case was referred by the Division Bench consisting of Mr. Justice Bhandari and Mr. Justice Soni, to the Full Bench,—*vide* their order, dated the 18th July, 1951.

Appeal from the order of Shri Gurdial Singh, Additional Sessions Judge, Amritsar, dated the 26th March, 1951, convicting the Appellants.

J. G. SETHI AND R. L. KOHLI, for Appellants.

S. M. SIKRI, Advocate-General and D. N. AWASTHY, for Respondent.

ORDER

Khosla, J.

KHOSLA, J. The following question has been referred to this Full Bench for decision:—

> If in an appeal, reference or revision, the High Court is of the opinion that the provisions of section 342 of the Criminal Procedure Code have been insufficiently complied with, is it within the power of the Court under the provisions of section 428 or 375 or any other section of the Code or of any other law to examine or further examine the convicts? If so, under what circumstances?

The matter arose in the following manner. Four persons were tried upon a charge of murder by a learned Judge who convicted two of them. One of them, Dara Singh, was sentenced to death and the other, Indar Singh, to transportation for life. The convicts filed an appeal to this Court and the case of Dara Singh was also referred by the learned trial Judge under section 374 of the Criminal Procedure Code. When the appeal came on for hearing Mr. Jai Gopal Sethi, who appeared on behalf of the appellants, raised a preliminary objection to the effect that the provisions of section 342, Criminal Procedure Code, had not been complied with by the learned Sessions Judge inasmuch as the accused persons had not been properly examined by him and all the circumstances upon which the conviction was based were not put to the accused persons and they were not asked to give an explanation of these circumstances. Mr. Sethi relying upon a recent decision of the Supreme Court in *Tara Singh* v. *The State* (1), contended that trial had been vitiated by the failure of the Sessions Judge to observe the provisions of section

(1) 1951 S.C.R. 729

342, Criminal Procedure Code, and the case should therefore be remanded for a fresh trial. A question arose whether the accused persons should not be sent for in the High Court and examined so that if they had any explanation of the circumstances proved against them they should be able to state their explanation and then this Court could determine what further steps in the matter were necessary. The contention of Mr. Sethi was that the accused persons could not be sent for in this Court because the irregularity committed by the learned Sessions Judge had vitiated the trial and this defect could not be cured by the appellate Court summoning the accused persons and examining them. The Division Bench consisting of my brothers Bhandari and Soni, then decided to refer the question stated above to a larger Bench. The matter had assumed importance in view of certain remarks made by Bose, J., of the Supreme Court and it was anticipated that a similar objection would be raised in a number of other cases.

The point for decision, therefore, is whether the High Court has the power to call an accused person and examine him at the time of hearing his appeal. The question broadly stated in this manner can admit of only one answer, namely, that the High Court has every power to summon an accused person and examine him, but the contention of Mr. Sethi is that where the object of summoning an accused person is to cure an irregularity of procedure the High Court has no such power more particularly when the irregularity is of such a type as renders the trial invalid, for that would mean that the High Court is curing an incurable irregularity. The powers of the High Court would, therefore, have to be considered in relation to an irregularity committed by the trial Court more particularly an irregularity which takes the shape of a breach of the mandatory direction contained in section 342, Criminal Procedure Code.

The general powers of appellate Courts in the matter of appeals are set out in section 423 of the Code of Criminal Procedure. This section contemplates that the appellate Court at the time of hearing this appeal can hear the appellant or his

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Pleader and when the appeal is filed by the State under section 417, Criminal Procedure Code, the accused person can also be heard. The power given to the appellate Court is a very wide one and does not restrict its functions to examining the record only. Indeed, additional evidence can be summoned by the appellate Court under section 428, Criminal Procedure Code. Our attention was also drawn to section 540, Criminal Procedure Code, which enables any Court at any stage of any inquiry, trial or proceeding to summon any person as a witness or examine any person in attendance though not summoned as a witness. The Court may also re-call and re-examine any person already examined. This section applies not only to trial Courts but also to appellate Courts, for the words used are "any Court" and "trial or other proceeding under this Code". A reference may also be made to the powers of appellate Courts in England. Section 9 of the Criminal Appeal Act, 1907, authorises the Court of Criminal Appeal to call for fresh evidence, order the production of document or exhibit, summon witnesses and to do various other acts which may be necessary to do justice in the matter. The power given to the Court of Criminal Appeal in England is even wider than the power given to the appellate Courts in India under the Code of Criminal Procedure even though trials in England are held with the aid of a jury. The object of the Legislature in giving these powers is not to constrict the functions of the appellate Court or to fetter their discretion but to attain the ends of justice, and if in order to do this fresh evidence is necessary the appellate Court has been given full authority to call such evidence. There is no bar against an appellate Court calling an accused person and hearing him. Indeed, if witnesses who give evidence against the accused person can be heard it follows *a fortiori* that an accused person can be heard in his own defence, and in view of these provisions (sections 423, 428 and 540, Criminal Procedure Code) it may seem somewhat astonishing to suggest that the High Court cannot call the appellant and hear what he may have to say in his defence. The point raised by Mr. Sethi, however,

is that it is not so much calling an accused person and hearing him (which the High Court can undoubtedly do) but of determining whether the trial by the original Court has been vitiated by some irregularity, and if that happens the only course open to the appellate Court is to order a fresh trial. Hence it is clear that an accused person may be summoned and examined by the appellate Court at any rate when the object of so doing is not to cure an irregularity of procedure which has vitiated the trial. The sole question which remains to be answered is whether this procedure can be followed in order to cure an irregularity or illegality in the trial.

Mr. Sethi has drawn our attention to certain remarks in the judgment of the Supreme Court in *Tara Singh* v. *The State* (1). I have made a careful study of this judgment and I find that two conclusions emerge therefrom. In the first place, their Lordships have laid down quite clearly that the provisions of section 342, Criminal Procedure Code, in examining an accused person should be fairly and faithfully observed and it is not sufficient compliance with the provisions of law to put a general question regarding the allegations of the prosecution without setting out the various circumstances which have been proved or established by the prosecution. In the case of a Sessions trial it is not sufficient to put to the accused person the statement which he made at the preliminary inquiry. The Sessions Judge must put to the accused various facts and circumstances which add up to his guilt.

In the second place, it is quite clear that every error or omission in the examination of the accused would not necessarily vitiate the trial. This is what Bose, J., observed:—

> "I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because, I am of opinion that errors of this type fall within the category of curable irregularities. Therefore, the question in each case

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depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of section 342, Criminal Procedure Code, is so gross in this case that I feel there is grave likelihood of prejudice."

Therefore, it will depend upon the facts of any particular case whether the failure of the Sessions Judge to examine the accused person properly does or does not amount to an incurable irregularity, and this point can only be determined by considering the facts of that particular case.

Let us first take the case in which the error is nothing more than a curable irregularity, and the first question that arises is how can the appellate Court determine that it is only a curable irregularity. Mr. Sethi argues that the Court should determine this point solely on the evidence on the record itself. On the other hand, it is contended by the learned Advocate-General that the Court has the power to call the accused person before it and then determine this point. Mr. Sikri's contention is that the appellate Court has always the power to call an accused person and hear what he has to say in his defence. If in any particular case the Sessions Judge has not properly examined him and has not put to him all the facts and circumstances which require an explanation, the appellate Court should summon the accused person and put these matters to him. If the explanation furnished by the accused person is no explanation at all the Court (the High Court or the appellate Court) may well come to the conclusion that the error was nothing more than a curable irregularity, for the accused had no explanation to give or his explanation was so unsatisfactory that it could be totally disregarded and the trial Court would not have come to any conclusion except the one at which it arrived. If, on the other hand, the accused has some plausible explanation to give or wishes to produce evidence in support of his explanation the appellate Court or the High Court may come

to the conclusion that this explanation should have been given at the trial, for had it been so given the trial Court might well have come to a different conclusion. In such a case the error or omission will not fall within the category of curable irregularities and the failure of the Sessions Judge to comply with the provisions of section 342, Criminal Procedure Code, will vitiate the trial. It appears to me that there is considerable force in Mr. Sikri's contention and this is the only sound and proper way of looking at the matter.

Mr. Sethi cited a number of rulings in which it was held that failure to comply with the provisions of section 256, Criminal Procedure Code, vitiates the proceedings and in such cases the only course open to the appellate Court is to order a retrial. He also cited a number of cases in which it was held that where the accused person was not examined after the close of the prosecution evidence as required by law the trial was vitiated. In particular he relied upon *Promotha Nath Mukhopadhaya* v. *King-Emperor* (1), *Dibakanta Chatterji* v. *Gour Gopal Mukherjee* (2), *Surendra Lal Shahe* v. *Ismaddi* (3), *Emperor* v. *Kondiba Balaji* (4), *Nana Sadoba and others* v. *Emperor* (5), *Mahommed Abdus Samad and others* v. *Emperor* (6), *Kundan Lal* v. *Emperor* (7), and *Anand Parkash* v. *Emperor* (8). There is, however, ample authority for the view that the failure to examine the accused person does not in every case vitiate the trial. A Division Bench of the Bombay High Court in *Emperor* v. *Kondiba Balaji* (4), held that every failure to comply with section 342, Criminal Procedure Code, does not necessarily vitiate the trial. There are many other reported cases but the point has been authoritatively decided by their Lordships of the Supreme Court in *Tara Singh* v. *The State* (9). The Privy

(1) I.L.R. 50 Cal. 518
(2) I.L.R. 50 Cal. 939
(3) I.L.R 51 Cal. 933
(4) A.I.R. 1940 Bom. 314
(5) A.I.R. 1938 Nag. 283
(6) A.I.R. 1925 Cal. 172
(7) A.I.R. 1934 Lah. 648
(8) A.I.R. 1934 Lah. 631
(9) 1951 S.C.R. 729

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Council held in *Pulukuri Kottaya and others* v. *Emperor* (1), that even a breach of the provisions of section 162, Criminal Procedure Code, amounts to a curable irregularity when the Court comes to the conclusion that as a matter of fact no prejudice was caused and no failure of justice has resulted. So it must first be determined whether any prejudice has been caused and whether a failure of justice has resulted. In order to determine whether prejudice has been caused the appellate Court may peruse the record, call the accused person and hear what he has to say in his defence. After doing this the Court may come to one of two conclusions. It may take the view that prejudice has been caused and in that case a fresh trial will have to be ordered, or it may come to the conclusion that no prejudice has been caused and in that case the error or omission of the trial Court would not amount to anything more than a curable irregularity. I cannot accept the contention of Mr. Sethi that the accused person cannot be summoned by the appellate Court for purposes of determining whether prejudice has or has not in fact been caused. Mr. Sethi says that this would be curing an irregularity. Calling the accused person and examining him, however, does not cure the irregularity but merely helps to determine whether the irregularity is of such a serious type as to be incurable or whether it is of a type which can be ignored under the provisions of section 537, Criminal Procedure Code. Our attention was also drawn to section 165 of the Indian Evidence Act, which empowers a Court to question a party which includes an accused person, in order to discover or obtain proper proof of relevant facts. If any facts are revealed they will have to be proved in the ordinary way. This means that if the convict has any explanation to offer, a fresh trial will have to be ordered. If on the other hand, the only information gleaned from the examination of the accused is that he has nothing to say and would have had nothing to say had he been examined at the trial, then the appellate Court will come to the

(1) A.I.R. 1947 P.C. 67

conclusion that the accused person was not prejudiced in any way and the non-compliance with section 342, Criminal Procedure Code, did not occasion any failure of justice.

There may be cases in which the appellate Court will not feel the need to summon the accused person, for upon a perusal of the record it will be sufficiently obvious that the accused person has been prejudiced, and in such cases a re-trial will at once be ordered. On the other hand, there may be cases in which the appellate Court feels the need to call the accused person and decide this question after hearing him, and in these cases a fresh trial may or may not be ordered according to the explanation given by the accused person. Again, there may be cases in which the Court feels that prejudice has been occasioned but no useful purpose will be served in ordering a fresh trial. These are cases in which the appellate Court will acquit the accused person instead of ordering a fresh trial.

There is only one other matter which deserves mention. The question proposed to the Bench referred to section 375 of the Criminal Procedure Code. This section deals with the powers of the High Court sitting as a Court of Reference. Ordinarily when the case of a person sentenced to death is referred to the High Court under section 374, Criminal Procedure Code, the High Court hears the reference after disposing of the appeal, and section 375, Criminal Procedure Code, is not intended to apply to the High Court sitting as a Court of Appeal. Therefore, it is clear that the accused person may be summoned under section 375, Criminal Procedure Code, but not for the purposes of deciding the appeal or determining whether any prejudice has been caused to the accused person on account of non-compliance with the provisions of section 342, Criminal Procedure Code.

I may now briefly sum up my conclusions. My answer to the question proposed is that it is within the powers of the High Court to examine

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and further examine the convicts and that the law does not place any restrictions upon this power. But if the High Court is of the opinion whether before or after examining the convicts that non-compliance with the provisions of section 342, Criminal Procedure Code, has occasioned or is likely to have occasioned prejudice to the convicts the High Court will order a fresh trial. If, on the other hand, it comes to the conclusion that no such prejudice was caused and no failure of justice was occasioned the appeal will be heard and decided upon merits. With regard to the order of remand this may contain a direction that the trial will proceed from the point where the irregularity occurred or a totally fresh trial may be ordered depending on the facts of that particular case. For instance, if the trial Judge has been transferred a *de novo* trial will be ordered. On the other hand, in some cases the same Sessions Judge may be asked to re-examine the accused and to dispose of the case without holding a completely new trial.

Bhandari, J. BHANDARI, J.—I agree.

Soni, J. SONI, J.—I agree.