PRIVY COUNCIL

Zahiruddin

Vs.

Emperor

P.C.A.No.82 of 1946
(Lords Wright, Du Parcq Normand, Sir Madhavan Nair and Sir John Beaumont JJ.)

18.02.1947

JUDGMENT

LORD NORMAND J.

1. This is an appeal from a judgment of the High Court in Bengal, which allowed an appeal against a Police Magistrate's order acquitting the appellant of a charge of accepting a bribe brought under section 161, Penal Code. The High Court set aside the order of acquittal, convicted the appellant and sentenced him to one year's rigorous imprisonment.

2. The main ground of appeal is that there have been contraventions of Section 162 Criminal PC, that the High Court's judgment relies on the testimony of a witness, Mr. Roy, who had given a signed statement to the police in breach of the section and had, also in breach of the section, had it before him and made substantial use of it while he was giving evidence. It was also made a ground of appeal that the police officers engaged on the investigation had failed to keep a diary in contravention of Section 172(1).

3. The appellant was employed from June till 24.8.1944, by the East Indian Railway as a grain depot officer at Howrah station. His chief duty was to receive from contractors articles for which orders were placed by the head office of the company, to compare them with approved samples and subsequently to distribute them. On 22.8.1944, a contractor named Bhattacharjee reported to Deputy Superintendent Dutt of the Calcutta Police that the appellant had solicited from him a bribe of Rs. 400 to pass a sale of 80 maunds of mustard oil and that he proposed to make this payment next day. Bhattacharjee subsequently gave evidence at the trial that the appellant had made this demand, but this evidence was not corroborated by any other witness. A

police trap was laid for the appellant on 23rd August, but its only result was that Bhattacharjee reported that the appellant was now refusing to take Rs. 400 and was demanding that Rs. 800 should be paid to him on 24th August at his residence at Park Circus. Another police trap was therefore prepared for the appellant, and on 24th August Police Superintendent Dutt, Mr. Roy, a Magistrate whose services as a witness had been obtained, Police Inspector Lahiri and Bhattacharjee went in a taxi driven by one Yasin to the block of flats in Park Circus where the appellant and his brother Nazimuddin lived. It was then after 8 P. M, the black-out was in force, and it was raining heavily. It was decided that Bhattacharjee should stay in the taxi with Mr. Roy, while Mr. Dutt and Inspector Lahiri stood by a lorry which was stranded on the pavement between the taxi and the flats. One of the party then called the doorkeeper, Ram Surdar, and sent him with a message to the appellant that someone had come by taxi to see him but was prevented by an injured leg from going up to the appellant's flat.

4. From this point the controversy of fact between the parties becomes acute. Bhattacharjee deponed that the accused came out of the block of flats, entered the taxi, took the seat beside the driver and, after asking who Mr. Roy was, and whether Bhattacharjee had brought the money with him, received from Bhattacharjee marked notes to the value of Rs. 800. Bhattacharjee further says that after some more talk the accused left the taxi, that he, Bhattacharjee, then gave a pre-arranged signal by flashing his torchlight, and that he saw the appellant being seized by the police witnesses.

5. The police witnesses testified that they saw the accused come down from his flat and enter the taxi, that after seeing the signal made by the torchlight they arrested him as he was about to re-enter the block of flats, and that as they did so he flung away a bundle of notes which they later found on the mudguard of the stranded lorry and identified as the notes previously marked. Mr. Roy gave evidence which corroborated Bhattacharjee's evidence about the passing of the marked notes from 'Bhattacharjee to the appellant, and the flashing of the torch; and which corroborated also the police evidence about the finding of the notes after the arrest of the appellant. Though Mr. Roy identified in Court the appellant's brother as the man who had taken the notes in the taxi, he identified the man who was arrested and who was undoubtedly the appellant with the man who received the notes. His identification of the brother in Court may therefore have been a mistake. What is more important is that the Magistrate has entered on the record at the end of Mr. Roy's examination in chief this

note: "He refreshed his memory, from time to time, by consulting his written statement to the police during investigation." The Magistrate called as court witnesses under section 540, Criminal PC, the doorkeeper of the block of flats, Ram Surdar, and the taxi-driver, Yasin, and they gave evidence that it was not the appellant but his brother who was in the taxi at the material time.

6. The Police Magistrate in his judgment, after expressing his complete distrust of Bhattacharjee and commenting adversely on the police evidence, speaks of Mr. Roy's defect of memory as evidenced by his free use of the written statement while he was deponing. The statement was made to the police three months after the events with which it dealt, it was signed by him and it was made to the police in the course of their investigation of the alleged offence. The Magistrate held that when a police officer during the investigation of an offence obtains a signed statement from a witness in contravention of section 162 Criminal PC, the evidence of the witness at the trial must be rejected. The record does not disclose how it came about that the Magistrate did not stop Mr. Roy at the beginning of his evidence from using the statement, and their Lordships are not disposed to seek information about this from sources outside the record. They must assume that the Magistrate intervened, as was his duty, as soon as he became aware of the irregularity.

7. The learned Judges of the High Court held "that breachs of the provisions of Section 162 Criminal PC, are not in themselves necessarily fatal to the proceedings and may in appropriate circumstances be cured as the expression is under the terms of Section 537 Criminal PC." In their opinion there was no substantial reason for thinking that Mr. Roy's evidence without the use of the statement to refresh his memory would have been in any material particular different from the evidence which he actually gave. For this reason they held Mr. Roy's evidence to be admissible, and they greatly relied on it in reaching the conclusion that the appeal from the Magistrate's order should be allowed and that the appellant should be convicted.

8. The objection to the conviction founded on the failure of the police witnesses to keep a diary as required by Section 172 (1), Criminal PC, may be conveniently disposed of at this stage. It was contended by learned counsel for the appellant that the evidence of the officers was inadmissible. This contention was not supported by reference to the statute or to authority, nor was it the view taken by the Magistrate. In the opinion of their Lordships, a contravention of section 172 lays the evidence of the police officers open to adverse criticism and may diminish its value, but it does not have the effect of making that evidence inadmissible.

9. The next question concerns the effect of Section 162 (1), Criminal PC, which provides that no statement made by any person to a police officer in the course of an investigation shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (saving certain exceptions not material to the present proceedings) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made. It was submitted for the appellant that the proceedings were entirely vitiated and, alternatively, that Mr. Roy's evidence was rendered inadmissible, for either of two reasons: first, because he had previously given a signed statement to the police, and second, because in giving his evidence he made use of the signed statement to prompt his memory. On the other hand it was argued for the respondent that a contravention of Section 162(1), merely affected the value of the evidence and that the High Court had taken the correct view of its effect in the present case. It appears to their Lordships that the effect of a contravention of the section depends on the prohibition which has been contravened. If the contravention consists in the signing of a statement made to the police and reduced into writing, the evidence of the witness who signed it does not become inadmissible. There are no words either in the section or elsewhere in the statute which express or imply such a consequence. Still less can it be said that the statute has the effect of vitiating the whole proceedings when evidence is given by a witness who has signed such a statement. But the value of his evidence may be seriously impaired as a consequence of the contravention of this statutory safeguard against improper practices. The use by a witness while he is giving evidence of a statement made by him to the police raises different considerations. The categorical prohibition of such use would be merely disregarded if reliance were to be placed on the evidence of a witness who had made material use of the statement when he was giving evidence at the trial. When, therefore, the Magistrate or presiding Judge discovers that a witness has made material use of such a statement it is his duty under the section to disregard the evidence of that witness as inadmissible. In the present case there is in the note at the end of Mr. Roy's examination-in-chief and, in the judgment of the Magistrate what amounts to a finding of fact that Mr. Roy while giving his evidence made substantial and material use of the signed statement given by him to the police, and the Magistrate was accordingly bound to disregard his evidence. The Magistrate's reason for doing so is too broadly stated, for it is not the mere fact that Mr. Roy had signed the statement but the fact that he had it before him and consulted it in the witness box that renders his evidence incompetent.

10. It follows that in the opinion of their Lordships the learned Judges of the High Court erred in law when they treated Mr. Roy's evidence as admissible. Section 537, Criminal PC, to which they made reference, requires a Court of Appeal subject to the earlier provisions of the statute to affirm an order of a Court of competent jurisdiction where there has been an irregularity in the proceedings unless the irregularity has in fact occasioned a failure of justice. The section cannot apply to a case like the present, in which the Magistrate has refused to overlook an irregularity and has acquitted. The further observations of the learned Judges that there was no substantial reason to think that Mr. Roy's evidence unaided by the written statement would have been in any material point different from the evidence which he gave, and that no real prejudice was caused to the appellant by the use of the statement, are in the opinion of their Lordships unfortunate and ills founded. It is impossible to say what Mr. Roy's evidence would have been if he had not used the statement to aid his memory; and it is also impossible to say that prejudice may not have been suffered by the appellant. But the conclusive answer to the reasoning of the judgment is that the language of the statute clearly prohibits any such use of the statement, and it must receive effect.

11. It was argued for the respondent that even without Mr. Roy's evidence there was a sufficiency of other evidence accepted as reliable by the learned Judges of the High Court to justify the conviction. While it is true that the police evidence taken along with the evidence of Bhattacharjee is relevant to infer the guilt of the appellant, that evidence is contradicted by other witnesses, and it has been the subject of adverse comment by the Magistrate. It is possible also that the High Court would have treated the evidence of the police and Bhattacharjee with less respect if it had not had Mr. Roy's evidence before it. The judgment of the High Court largely depends on his evidence. It could, therefore, be neither logical nor fair to affirm the order of the High Court, while holding that the Court erred in taking Mr. Roy's evidence into consideration. On the other hand the submission for the appellant that the acquittal by the Magistrate should at this stage be finally reaffirmed would have been appropriate if the irregularity which has taken place had had the effect of vitiating the whole proceedings, but it is too favourable to the appellant on the opinion which their Lordships have expressed upon the effect of section 162. The appellant's complaint that the High Court had failed to have due regard to the principles laid down in 61 IA 398,1 would have had greater force if the High Court had not believed itself entitled to rely on the evidence of Mr. Roy, and without that evidence these principled will manifestly have a special relevance to the circumstances of the case.

12. Their Lordships consider that the fair course is to allow the appeal to the effect of setting aside the order of the High Court, and to remit to the High Court to re-hear and determine the appeal on the evidence in the case subject to a direction to exclude from consideration the evidence of Mr. Roy and to deny it all effect. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.