

CALCUTTA HIGH COURT

Express Dairy Ltd

Vs.

Corporation of Calcutta

Criminal Appeal No. 104 of 1949

(Sen, J.)

10.08.1949

JUDGMENT

Sen, J.

1. This is an appeal by the Express Dairy Limited against an order of conviction passed by Sri N.K. Ghose, Municipal Magistrate, Calcutta, convicting the Company of having committed an offence punishable under Section 407 read with Section 488, Calcutta Municipal Act. In short, the company was charged with storing for sale adulterated milk. The company has been sentenced to pay a fine of Rs. 500. Various defences were taken in the Court below. On the merits the defence was that the milk was not adulterated and in support of that various points were raised regarding the method of the examination of the milk.

2. Having regard to the decision at which I have arrived, it would not be proper for me to consider the merits of the case. Mr. Das appearing on behalf of the company points out to me that there was no examination of the company in accordance with the provisions of Section 342, Criminal Procedure Code. He further points out that the provisions of Section 242, Criminal Procedure Code, were not also observed. On these grounds he says that the whole trial has been vitiated. His argument is that by virtue of the provisions of Section 5, Criminal Procedure Code, the offence with which the Company has been charged should have been tried in accordance with the provisions of the Code of Criminal Procedure. On behalf of the Corporation Mr. Mukherjee contends that there has been substantial compliance with the provisions of the Code of Criminal Procedure and that the accused has not been prejudiced by anything done by the learned Magistrate. On behalf of the Crown Mr. Banerjee adopts the contentions raised by Mr. Mukherjee. A further argument placed by them is that it is not possible to follow the provisions of Sections 242 and 342, Criminal Procedure Code, inasmuch as the accused was merely a juridical person and not an actual person. That being so, they contended that there could be no personal examination of the Company under Section 342, Criminal Procedure Code, nor could there be any explanation given regarding the offence charged to the company personally in accordance with the provisions of Section 242, Criminal Procedure Code.

3. There can be no doubt that as the Company is merely a juridical person, the charge could not

be explained to the Company itself nor could the Company personally make a plea. It is also obvious for the reasons stated above that the Company could not be personally examined in accordance with the provisions of Section 342, Criminal Procedure Code. The question which arises is whether by reason of these circumstances the Court was absolved from following the provisions of Sections 242 and 342, Criminal Procedure Code. In my opinion the Court was not so absolved. The Code provides in Section 205 for the appearance of an accused by his pleader. The word 'pleader' does not necessarily mean a lawyer engaged to argue the case but it includes an agent duly empowered to answer all questions on behalf of the accused. Now, in this case it was possible for the Company to be represented by somebody and indeed no other means of appearance were possible. If the Company was represented by what I may term its agent, then it was the duty of the Court to follow the provisions of Sections 242 and 342, Criminal Procedure Code, as if such agent were the accused. In the present case the Company authorized a lawyer to defend the case, but it is not at all clear that the lawyer was an agent of the Company for all purposes; that is to say, it is not quite clear that the lawyer was given the right to do all such things as the Company could have done if it were a physical being. From the record it appears that one Mr. Calloden, the Manager of the Shop in Lindsay Street where the milk was seized, appeared on the date fixed for the trial. To neither of them was the charge explained in accordance with the provisions of Section 242, Criminal Procedure Code. I shall assume for the moment that Mr. Calloden was empowered to do all things which the Company could have done and that he was a physical embodiment of the juridical person which was the Company. If that be so, it was the duty of the Court to state to Mr. Calloden the particulars of the offence of which he was accused and to ask him if he had any cause to show why the Company represented by him should not be convicted. This is clearly laid down in 8. 242, Criminal Procedure Code, which is in the following terms:

" When the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted; but it shall not be necessary to frame a formal charge."

Nothing of the kind was done by the learned Magistrate. What he has stated is as follows :

"Mr. N.B. Guha appears with Mr. Calloden, Sales Manager of Express Dairy Co., Ltd., and denies the charge and says B.N. Sharma does morning duty and looks after sales at the time, etc."

It is very difficult to understand what the learned Magistrate means. Was he reproducing the statement of Mr. Guha or of Mr. Calloden? I am unable to decide this question. I find that the learned Magistrate has made no attempt to follow the Code of Criminal Procedure. He seems to be oblivious of the provisions of Section 5, Criminal Procedure Code. There is nothing in the record to show that the offence was ever explained either to Mr. N.B. Guha or to Mr. Calloden, nor is it possible to find out who denied the charge. It is clear, therefore, that the provisions of Section 242, Criminal Procedure Code, have not been followed.

4. I now turn to the consideration of the question whether the provisions of Section 342, Criminal

Procedure Code, have been followed. It is admitted on behalf of the respondent and the Crown that there has been no examination of anybody in accordance with the provisions Section 342, Criminal Procedure Code.

5. The next question for decision is whether the failure to observe these provisions of the Code would vitiate the trial, or whether these errors were of such a nature that they are curable with the help of the provisions of Section 537, Criminal Procedure Code, on the ground that the accused has not been prejudiced by these errors of procedure. It has been held by this Court that the failure to observe the provisions of Section 242, Criminal Procedure Code, vitiates the entire trial; see the case of *Gopal Krishna v. Matilal Singh*¹, It has also been held in a long series of decisions that failure to observe the provisions of Section 342, Criminal Procedure Code, also vitiates a trial. It has been contended by learned Advocate appearing on behalf of the Corporation that the recent decision of the Judicial Committee in the case of *Pulukuri Kottaya v. King-Emperor*², has really done away with these decisions and he contends that having regard to this decision it should be held that these errors are curable by invoking the aid of Section 537, Criminal Procedure Code. In my opinion the decision of the Privy Council has not decided that these decisions of the Indian Courts are incorrect. In the case before the Judicial Committee the question involved was whether the denial of the right given to an accused person by the proviso to Section 162, Criminal Procedure Code, amounted to an illegality which vitiated the entire trial. The Judicial Committee held that failure to give the accused the benefit of the proviso to Section 162 of the Code was a serious matter, but that in the particular circumstances of that case the error was curable by Section 537, Criminal Procedure Code, inasmuch as the accused had not been prejudiced. It did not deal directly with the provisions of Sections 242 and 342, Criminal Procedure Code. In passing, however, their Lordships made certain observations which are to be found at p. 479 of the aforesaid report. I may mention in this connection that Mr. Pritt appeared on behalf of the accused and contended that the error committed by the Crown was incurable. He argued that a breach of a direct and important provision of the Code of Criminal Procedure could not be cured and that it must lead to the quashing of the conviction. Their Lordships remarked that this argument found some support in two cases namely in the case of *Tirkha v. Nanak*³, and *In re Madura Muthu Vannian*⁴, in which the view was expressed that any failure to examine the accused under Section 342, Criminal Procedure Code, was fatal to the validity of the trial and could not be cured under Section 537 of the Code. Their Lordships then expressed the opinion that the argument of Mr. Pritt was based on too narrow a view of the operation of Section 537, Criminal Procedure Code. They did not say that the failure to observe the provisions of Section 342, Criminal Procedure Code, was curable under Section 537 of the Code if it could be shown that it did not prejudice the accused; nor did they anywhere say that failure to observe the provisions of Section 242, Criminal Procedure Code, was curable under Section 537 of the Code if the error did not cause prejudice to the accused. I do not think therefore that this case is of much help to the respondent. The decisions regarding the effect of the non-observance of the provisions of Sections 242 and 342, Criminal Procedure Code, therefore remain unshaken.

6. I would further add that I am quite unable to appreciate how, Section 537, Criminal

¹4 Cal 359: (AIR 1927 Cal196: 28 Cr LJ 155) ³49 All 475 : (AIR 1927 All 350 : 28 Cr LJ 291)

²51 CWN 474: (AIR 1947 PC 67: 48 Cr LJ 533) ⁴45 Mad 820 : (AIR 1922 Mad 512 : 24 Cr LJ 124)

Procedure Code, can ever apply to a case where the provisions of Section 342 of the Code have not been observed. If an accused person is convicted without the observance of the provisions of Section 342 of the Code it would amount to a conviction of a person without properly hearing his

defence. In India the accused is not permitted to give evidence and the provisions of Section 342 of the Code which give an opportunity to the accused to place before the Court in his own words his explanation regarding the facts appearing against him and to place before the Court in his own words what his defense is. This is a very important and fundamental right. Before a Court can find a person guilty it should hear what that person has to say. The failure to examine the accused under Section 342, Criminal Procedure Code, deprives the accused of the right to place his entire defense before the Court and it amounts to a fundamental error in a criminal trial, an error which cannot in my opinion be cured by the provisions of Section 537, Criminal Procedure Code, on the ground that there was no prejudice to the accused.

7. As regards the failure to observe the provisions of Section 242, Criminal Procedure Code. I have already said that this Court has decided that the failure vitiates the entire trial and nothing has been said against this decision by the Judicial Committee. As it is a decision of a Division Bench of this Court I am bound to follow it and no other reason is necessary to be given for holding that the trial is vitiated by reason of the non-observance of the provisions of Section 242, Criminal Procedure Code.

8. Having regard to what has been said above I hold that the entire trial has been vitiated. The order of conviction and sentence are set aside and the case is sent back for retrial de novo by Sri S.P. Chatterjee, Municipal Magistrate, in the light of the observations made above.

9. Mr. Das on behalf of the company undertakes that the company shall appoint a person to represent it at the trial for all purposes as if he were the company itself. Conviction set aside; retrial ordered.