

# **BOMBAY HIGH COURT**

Dorabshah Bomanji Dubash

Vs

Emperor

(Fawcett, J.)

06.11.1925

## **JUDGMENT**

### **Fawcett, J.**

1. In this case a complaint, was made against the accused before the Fourth Presidency Magistrate for offences-under the Bombay City Municipal Act. The case was a summons one. The petitioner says that he only received the summons on June 23, the date fixed for his attendance being the 24th; that not having sufficient time at his disposal he could not instruct a pleader; so he merely sent his estate manager to the Court, believing that, if necessary, an adjournment would be granted; that on June 24, when the case was called on, the petitioner's manager was. asked, among other things, whether certain repairs had been carried out, to which he replied in the affirmative; and that nothing further was done by the learned Magistrate, who at once proceeded to make an order convicting the petitioner and fining him Rs. 30.

2. This Court is asked to interfere on two grounds, firstly, that it is not true that; the manager pleaded guilty as recorded in the Magistrate's proceedings; and, secondly, that the Magistrate had no jurisdiction to treat the petitioner's manager as if he were the accused and convict him upon any plea that such manager might make. We called for the report of the Presidency Magistrate upon the allegations in the petition. With regard to the first point, the learned Magistrate reports that the charges were read to the manager, as well as interpreted to him and that he pleaded ' guilty and said that the work was not done according to requisition. He says that it is a falshehood on the part of the petitioner to say that when questioned whether the repairs had been carried out, the manager answered in the affirmative; and that if the manager had so answered he (the Magistrate,) would have at once recorded the plea of not guilty,' and proceeded to record evidence, as required by law in summons cases. Whether or not the manager did in fact plead guilty is a question, which under the ordinary rule applicable to such a case mainly depends upon the actual record in the proceedings; and in view of the fact that the Magistrate has distinctly recorded that the "accused" by which, of course, he means the manager who was actually present

and not the real accused pleads guilty," there is the strongest presumption that in fact such a plea was made by the manager, and to rebut it would require strong reasons for this Court holding that the record did not represent the true state of facts. In the present case, we certainly think that there is no sufficient ground shown for interfering upon the allegations of the petitioner, which are contradicted by the Magistrate's record.

3. The main question before this Court is the contention that the Magistrate acted illegally in convicting the accused upon the plea of his estate manager. It is urged that Section 242 and connected provisions of the Criminal Procedure Code show that to enable the Magistrate to convict an accused upon the plea of guilty under that section the accused himself must be present and actually make his plea. Now no doubt, Section 242, which says that when the accused appears or is brought before the Magistrate he should be asked about the alleged offence, and Section 243 which allows a conviction if the accused admits that he has committed the offence of which he is accused, at first sight, favour this contention. But, on the other hand, although Section 204 says that a Magistrate taking cognizance of an offence in a case where a summons should issue in the first instance, " shall issue his summons for the attendance of the accused," yet under Form No. 1 in Schedule V the person summoned is required to appear in person or by pleader before the Magistrate. Of course the form cannot itself override any express provision of the Code, but in the absence of a clear provision that only the accused's own plea should be accepted for the purpose of Section 243, the Court must give due regard to the fact that this form of summons contemplates an accused appearing not necessarily in person but by a pleader. No doubt under Section 205 of the Criminal Procedure Code, whenever a Magistrate issues a summons, he may, if he sees reason to do so, dispense with the personal attendance of the accused, and permit him to appear by his pleader, and the words "or by pleader" may have been inserted in the form with reference to this particular provision. A Magistrate can, therefore, at the time of issuing a summons direct that the personal attendance of the accused should be dispensed with. On the other hand, he can also do this after the issue of the summons; and if the person summoned takes the risk of not attending in person and sends a pleader to represent him, provided the Magistrate gives the necessary permission under this section, the Code does allow representation of the accused by his pleader. This is in accordance with the provisions of Section 34 under which an accused person may of right be defended by a pleader. Then, again, under Section 366, in a case where the accused's personal attendance has been dispensed with, he need not even attend to hear judgment, if the sentence is one of fine or he is acquitted, and if his pleader is present at the delivery of the judgment. Having regard to these provisions, I think, it is clear that, in a case where the Court has allowed an accused to appear by a pleader, it must be taken that such appearance involves the performance of all acts that devolve upon the accused in the course of the trial, unless the Magistrate thinks it necessary or desirable that the accused

himself should be present for any particular purpose, such, as for examination by the Court under Section 342 or pleading to a charge under Section 255. In such a case I cannot see any sufficient ground, in spite of the fact that Sections 242 and 243 speak of the accused only, for holding that his pleader may not make the necessary answers and plead guilty or not guilty on this behalf. A decision to this effect has already been given in Sind in *The Crown v. Jamal Khatun*<sup>1</sup> to which Pratt, J., of this Court was a party.

4. This is supported by the view which has been taken in England upon the corresponding provisions of the Summary Jurisdiction Act 11 and 12 Vic, C. 43, Section 14, on which the provisions of Sections 242 and 243 of the Criminal Procedure Code, as regards summons cases, are probably based. In the case of this section there would be stronger ground for the contention that only the accused person himself could plead guilty and be convicted upon such a plea, because the section begins : " And be it enacted, that where such defendant shall be present at such hearing the substance of the information or complaint shall be stated to him, and he shall be asked if he have any cause to show why he should not be convicted...and if he thereupon admit the truth of such information or complaint, and show no cause or no sufficient cause why he should not be convicted...then the said Justices shall convict him " accordingly. Yet, spite of these provisions, it has been held that an accused, or a defendant as he is called in that Act, need not attend personally on the date fixed in the summons, but can appear by his counsel or attorney and that the plea of such counsel or attorney is sufficient to enable the Justices to proceed thereupon in accordance with this Section 14. The most recent case on the point is *Rex v. Thompson*<sup>2</sup>. In that case the defendant was summoned for an offence under the Motor Car Act, 1903. The prosecution wanted his personal appearance so that evidence could be given of witnesses, who might have been able to identify him as a person who had been previously convicted of a similar offence; and the defendant's counsel having refused to give an undertaking that the defendant should attend the Court for that purpose, the Justices issued a warrant for the defendant's arrest. This was questioned in the proceedings in the High Court, and it was held that where in answer to a summons issued by a Court of summary jurisdiction, the defendant has appeared by counsel, there is no obligation upon him to appear personally, and the Justices have no jurisdiction to compel his personal appearance by warrant. That, of course, is a somewhat different point from the present one; but in the course of the judgment Lord Alverstone, C.J., also considered the question whether the personal attendance of a defendant was necessary to enable the Court to proceed under Section 14, so that it was not merely an ex-parte proceeding. He says (p. 617) : "It was suggested that [certain provision in this Act] implies that there must in all cases be a personal appearance by the defendant, even though he may be re-presented by counsel, unless such personal appearance is expressly waived by the Justices; and it was said that in the absence of such waiver, if the defendant appears by counsel and does not appear personally, any hearing

of the case by the Justices, though counsel for the defendant is present, is *ex parte*. I cannot take that view." Then the Lord Chief Justice considered various provisions bearing upon the question, and relied upon a previous decision in *Bessell v. Wilson*<sup>3</sup> where the question was whether the defendant could appear by counsel, unless his personal appearance was expressly waived. The action was against an alderman for trespass in causing the plaintiff to be arrested under a warrant issued by the defendant in default of appearance. The plaintiff alleged that the warrant was issued without jurisdiction, as he had in fact appeared by attorney. Alverstone, C.J. proceeds to say (p. 619) : "That is the very argument that has been addressed to us today. Lord Campbell in giving judgment said (p. 499) : 'It cannot be Justly said that the party did not appear according to the exigency of the summons.... At the time and place appointed by the summons the plaintiff did appear by his counsel and attorney, and his counsel earnestly pressed that he might be heard to show cause...but the alderman refused to hear him because the party was not personally present. We think that in so refusing the alderman was wrong in point of law. The legitimate object of the summons did not render necessary the personal appearance of the party; and that object might be better answered if he appeared by his counsel and attorney.'" That was a decision 'that in a case where the defendant is represented by counsel he need not appear personally, and that the plea of his counsel that he was or was not guilty was one that the Justices could act upon; and Lord Alverstone says that that is a decision the correctness of which he thought, the Court ought not to question. Then again, in another case *Beg. v Aves*<sup>4</sup> a boy was summoned for breaking a window. Being unable from illness to attend, he admitted to his father that he had broken the window, but alleged that he had not done it intentionally. The father thereupon communicated with an attorney who, under all the circumstances, recommended that he should appear and plead guilty. Accordingly that attorney pleaded guilty and the Justices convicted the defendant and sentenced him to a term of imprisonment. From the affidavit it appeared that the defendant had given neither to his father nor to the attorney any authority whatever to plead guilty, nor did it appear that he was aware that his father intended to employ an attorney. It was held that as the defendant had not authorized any attorney to appear and plead guilty, the conviction was bad. That of course is a decision upon the special circumstances of the case. But it was argued by the defendant's counsel that the Court had no authority to adjudicate upon a plea of guilty, unless pleaded by the defendant in person, and upon that particular point Coekburn, C.J., says (p. 66) : "I am very far from saying that a defendant may not appear and plead by an attorney." So that his opinion obviously, went the same way. Therefore, I am not prepared to assent to the proposition that, where a Court does dispense with the attendance of an accused appearing by a pleader under Section 205, the Court cannot act upon the plea given by his pleader in a case falling under Sections 242 and 243 of the Criminal Procedure Code.

5. In *Emperor v. Stirsing*<sup>5</sup> no doubt Batty, J., says that " no pleader can be called upon to plead on

behalf of his client 'guilty' or 'not guilty'; and it is improper for a Magistrate to act on such a plea." In that particular case, the accused was present at the time when the pleader gave his plea, and it is a different case from the one we have before us, Also Aston, J., does not endorse Batty, J.'s remark, and only says that it would have been more regular in form if the Magistrate had called on the petitioner to say with his own lips whether he denied the truth of the complaint. But, in any case, having regard to the considerations I have mentioned, I think the dictum of Batty, J., on this point is too widely expressed, if it was meant to apply to a case falling under Section 205 of the Criminal Procedure Code.

6. The next point to be considered is whether this was a case in which, first of all, the Court dispensed with the attendance of the accused under Section 205; and, secondly, the estate manager can be said to be a pleader authorized by the accused to represent him for the purpose of pleading under Section 242 of the Cr.P.C. Inasmuch as the Magistrate's record shows that he did allow the estate manager to appear and did not insist upon the presence of the accused, and inasmuch as he acted upon the estate, manager's plea, I think there can be no doubt whatever that impliedly he had dispensed with the attendance of the accused under Section 205, and we also understand that the summons was in the form permitting him to appear by pleader. But I think it is certainly desirable in a case of this kind that a Court should not leave such a point to mere implication, but should note upon his record, that permission under Section 205 has been given. However, the mere omission to do this would be an irregularity and would not justify our interference.

7. The question, however, whether the estate manager can be said to be a pleader within the meaning of the definition in Clause (r) of Section 4 of the Criminal Procedure Code is more open to doubt. Under the Code, before it was amended in 1923, that definition covered the case of any mukhtar or other person appointed with the permission of the Court to act in the proceeding in the Court. It might have been contended that the words "or other person" should be construed as ejusdem generis with mukhtar, as implying that the other person should be an agent of some professional ability like a mukhtar who is recognized by the Legal Practitioners Act. But, on the other hand, it has been distinctly ruled by this Court, certainly in two cases, that the words "other person," included an ordinary agent appointed by the accused to represent him. In *Reg. v. Ramchandra*<sup>6</sup> it is held that the Criminal Procedure Code of 1861 entitled a prisoner to authorize any person to be his agent in any criminal Court, and in *Queen-Empress v. Chandrabhaga*<sup>7</sup> the facts were that a woman was charged with the offence under Section 61 of the Bombay District Municipal Act and, she being unwell, her father-in-law appeared in Court on her behalf and the trying Magistrate proceeded with the case and convicted her. It was held that the father-in-law of the accused might probably have been received by the trying Magistrate as a person appointed by her to act in the proceedings before him consistently with Section 4 of the Code of Criminal

Procedure. It would also be difficult to see any real and substantial ground for limiting the words "other person" so as to exclude any other person that may be duly appointed, for instance, in the common case of a person who is absent from the place where his estate is, and gives a power of attorney to some one to represent him for the purposes of any proceedings that may be taken against him. Any doubt on this point is removed by the amendment of Clause (r) by Section 2 of Act 35 of 1923, in which the word mukhtar" has been transposed to another place and the words "any other person," etc., appear in a separate part (2) by themselves. Therefore, I think it was open to the accused to appoint his estate manager to appear in his stead, and plead and do other acts on his behalf in the case against him, and it was equally open to the Court, having regard to the terms of the definition in Clause (r), to permit the estate manager to represent the accused as a pleader. But on the other hand, this is a deviation from what is ordinarily contemplated by the provisions of the Code, namely, that an accused should himself appear and plead personally, and, in my opinion, whenever such a deviation is allowed there should be clearly on record something to show that the person who represents the accused has been duly appointed by him just as an ordinary pleader has to file a vakalatnama under Rule 58 of the High Court Criminal Circulars, 1915; and, secondly, to show that the Court has given the requisite permission for his appearance in place of the accused. In the present case, the record is defective in both respects; and in so far as there was no power of attorney or any letter of authority to show that the estate manager was really appointed with full powers to represent the accused here is a legitimate doubt upon this question of appointment.

8. It certainly would seem from the report of the Magistrate that some laxity of practice has grown up in regard to this matter, for he says:in most of the Municipal cases landlords who are charged rarely appear. They are either represented by pleaders or their agents who hold power of attorneys or are rent-collectors or estate managers. These latter persons are allowed to appear for accused in Municipal cases as they fall under the definition of 'pleader' as defined in Section 4(r) of the Criminal Procedure Code. It is a long standing practice in these Courts to allow such persons to represent the accused and it is legal.

9. He further states:Every week there are from 200 to 300 Municipal cases in this Court and estate agents and managers and rent collectors of landlords appear to answer the charges and plead "guilty." or not guilty." If, in such cases, after the pleas of "guilty" of persons duly representing the accused were recorded and accused fined, the landlords were to come and say that they were not present and the Magistrate had usurped jurisdiction, the whole work (as far as Municipal cases are concerned) would be at standstill.

10. On the other hand, in forwarding the report, the learned Chief Presidency Magistrate says that he is not aware that it is a long-standing practice in the Presidency Magistrates' Courts to allow

any person to appear and record a plea regarding the guilt or otherwise of an accused person in the latter's absence, nor is he aware that in Municipal cases estate agents and managers and rent collectors of landlords are allowed to appear to answer charges and that land" lords are exempted because they are busy persons.

11. In my opinion, it is obvious that, though it may tend to the convenience of landlords to be represented in this fashion the Court should see that permission is given only in proper cases and no wrong practice be allowed to grow up. No doubt, the Presidency Magistrates have more important work to do than try Municipal cases, which are generally of a somewhat petty description, and this no doubt tends to the work being done more hurriedly than might otherwise be the case. It is a question for consideration, in my opinion, whether it is not possible to make some better arrangement for dealing with, Municipal cases, for instance, either by the appointment of a special Magistrate for them, or by their being put before a Bench of Honorary Magistrates. But, in any case, I do not think, we can uphold irregularities merely because of the resultant convenience to the landlords or the Court. In the present case, although I have no doubt that the accused by sending his estate manager, primarily implied that the Court should accept the manager as his representative, there arises a legitimate doubt as to the extent of his exact authority, and therefore, I think, it is a case in which we should not accept the conviction of the accused.

12. I would, therefore, on that ground, and not on the general ground of illegality which has been put before us by the petitioner's counsel, set aside the conviction of the accused and the line of Rs. 80 and direct that the accused should be re-tried by such Magistrate or Bench of Magistrates as the Chief Presidency Magistrate may direct. The fine, if paid, to be refunded to the accused.

**Madgavkar, J.**

**13. I agree.**

Cases Referred.

1[1912] 6 Sind. L.R. 206

2[1909] 3 K.B. 614

3[1853] 1 E. and B. 489

4[1871] 24 L.T. 64

5[1904] 6 Bom. L.R. 861

6[1862] Rat. Unrep Cr. C. 1

7[1884] Rat. Unrep. Cr. C. 206