Raja Ram vs State on 22 September, 1953

Equivalent citations: AIR1954ALL204

JUDGMENT

Brij Mohan Lall, J.

1. This is an application in revision by one Raja Earn who has been convicted by a learned Magistrate, 1st Class, of Etawah of an offence punishable under Section 161, I. P. C. and sentenced to pay a fine of Rs. 200 and in default to undergo three months' simple imprisonment. The conviction and sentence were upheld on appeal by the learned Sessions Judge of Mainpuri.

2. The applicant was a civil Court Amin to whom a certain decree was sent for execution. The findings of fact recorded by the Courts below which have to be accepted as correct in these proceedings are that the applicant demanded illegal gratification from the 'pairokar' of the decree-holder in order to execute the decree speedily. The 'pairokar' approached the District Magistrate who ordered another Magistrate to lay a trap for the applicant. A trap was laid and currency notes worth Rs. 15/- of which the numbers had previously been noted by the Magistrate, were delivered to the applicant. He was caught red-handed in possession of those currency notes.

3. Three points have been argued by Mr. Darbari before me. It is pointed out, in the first place, that the investigation was conducted by a police officer of Sub-Inspector's grade and that this is forbidden by the proviso to Section 3, Prevention of Corruption Act (2 of 1947). This proviso runs as follows:

> "Provided that a police officer below the rank of Deputy Superintendent of Police shall not investigate any such offence without the order of a Magistrate of the first class or make any arrest therefor without a warrant."

It will appear from the language of this proviso that ordinarily an officer below the rank of a Deputy Superintendent of Police is not to conduct the investigation in a case like the present. But an exception is possible if sanctioned by a Magistrate of the first class. In the present case Mr. Kansal, a Magistrate of the first class, had given such a permission. It is Ex. P-15. Thus, the first argument has no force.

4. The second argument advanced by Mr. Darbari is that the sanction prescribed by Section 6 of the said Act was given on 25-8-50, but the District Magistrate had taken cognizance of the case as early as on 6-6-50. What had happened on 6-6-50 was that it was brought to the notice of the District Magistrate that the applicant was demanding illegal gratification. The District Magistrate had ordered another Magistrate to lay a trap. This did not amount of taking cognizance of any case. As a

matter of fact, no case was pending at that time. Nor had any offence been committed till then. The District Magistrate really directed his subordinate to find out whether the oifence was going to be committed or not. His action did not amount to taking cognizance of any case against the applicant. In the circumstances I find no force in the second argument as well.

5. Mr. Darbari's next argument which forms the main contention in the case is that it was obligatory on the part of the Magistrate trying the case to inform the applicant that by reason of Section 7 of the Act the applicant could appear as a witness for himself and that failure on the part of the Magistrate to perform this duty amounted to an illegality which vitiates the conviction. I have given due consideration to this argument. I find nothing in the Prevention of Corruption Act which can be construed as laying down a duty on the Magistrate to inform an accused of this right of his. Everyone is presumed to know the law. A litigant coming before a Court of law must know what his rights are and it is open to him to exercise such rights or not. A Magistrate is ordinarily under no obligation to point out to a litigant what his rights are.

Wherever it was intended by law that a Magistrate or a Court should draw the attention of a litigant towards any particular matter it has expressly said so. For instance, Section 371(2)(c) lays down that "When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred,"

> Had the matter been 'res Integra', I would have had no hesitation in holding that there has been no illegality in the present case. But Mr. Darbari has drawn my attention to a Division Bench ruling reported in -- 'Rex v. Promod Chandra,' AIR 1951 All 546 (A).
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> In that case Moothara and Wanchoo JJ. held: "The failure of a Court to inform an accused person charged with an offence punishable under Section 161 or 165, Penal Code of his right to give evidence on oath in disproof of the charge is a grave irregularity the effect of which must depend upon whether in the opinion of the appellate Court, it has in fact occasioned a failure of justice. If it has the trial is bad, and the Court will consider whether the circumstances are such that a retrial should be ordered;"

6. If there really exists a duty on the Court to inform the accused of his right, the failure on the part of the Court to perform this duty will certainly prejudice the accused. In a case of illegal gratification the transaction is settled at a time when none besides the giver and the taker is present. The giver always enters the witness-box. If the failure of the taker to enter the witness-box results from an omission on the part of the Court to perform its duty there will certainly be a prejudice to the accused. He can always say that evidence available to him which could be brought on the record is not available to the Court because of the Court's default.

But, if the Court is under no such obligation, the accused cannot make a grievance of the fact that he was not told about his right. I am, therefore, of the opinion that if it is held that there was such a duty on the Court the applicant has undoubtedly been prejudiced. The net result therefore is that if

the law is as laid down in this authority, the least that should be done in the present case is to order a retrial. But with utmost respect to the learned Judges who were responsible for this ruling, I am of the opinion that the view taken by them needs reconsideration.

7. Reliance has been placed by the learned Judges on the case of -- 'R. v. Villars', (1927) 20 Cr. App. 150 (B). The report of this case is not available in the Library and I have not had the advantage of reading what is laid down in this case. This ruling seems to have interpreted the provisions of the Criminal Evidence Act of 1890 (61 and 62 Victoria C 36), I have gone through that statute. In the first place, it has no application in India and secondly there is nothing in it which casts such a duty on the Court.

8. In the circumstances I direct that this case be laid before the Hon'ble the Chief Justice so that he may consider the desirability of forming a Full Bench for the decision of the following question, viz. "Whether it is obligatory on the part of a Court trying a case under Section 161 or 165, I. P. C. to inform the accused that he can appear as a witness for himself."

Desai, J.

9. Our brother Brij Mohan Lall has referred the following question to us for answer: "Whether it is obligatory on the part of the Court trying a case under Section 161 or 165, I. P. C. to inform the accused that he can appear as a witness for himself."

10. The applicant, who was a civil Court Amin, was prosecuted for the offence of Section 161, I. P. C. before a first class Magistrate; it was alleged that he had accepted an illegal gratification from a party for the purpose of executing his decree speedily. He was convicted by the Magistrate and his appeal was dismissed. He went up in revision which was heard by our learned brother. One of the pleas taken up before him was that it was obligatory upon the Magistrate to inform him that he r^ould appear as a witness for himself and that his failure to do so amounted to an illegality which vitiated his conviction.

Our learned brother was of the view that if the Magistrate's failure to inform the applicant of his right to give evidence for himself in defence was an illegality, it caused a prejudice to him, but he was doubtful if it was at all an illegality. He doubted the correctness of the decision by a Bench of this Court in -- 'AIR 1951 All 546 (A)'. He was, therefore, obliged to refer the question to a Full Bench for its decision.

11. Under the Code of Criminal Procedure an accused cannot be administered oath and has no right to offer himself as a witness and cannot be compelled to give evidence. But by the Prevention of Corruption Act, 1947, a person charged with an offence punishable under Section 161 or Section 165, Penal Code has been given the right to offer himself as a witness. The relevant provision is Section 7 which lays down that such a person "shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him" (or any person charged together with him at the same trial).

It further lays down that he shall not be called as a witness except on his own request and that "his failure to give evidence shall not be made the subject of any comment by the prosecution or give rise to any presumption, against himself."

There is no provision in the Act expressly making it obligatory upon the Court trying such an accused to inform him of his right to give evidence on oath in disproof of the charges made against him. This fact was conceded by Shri B. S. Darbari. He contended that the obligation is implied and has relied upon certain English decision. He contended that because the Prevention of Corruption Act is a recent enactment making a departure from the old law which did not permit an accused person's giving evidence on oath in defence and because in many cases he would be the best witness to rebut the presumption, which the Court is bound to draw under Section 4 of the Act, he must be informed of his right.

Though the provision that a person accused of ant offence punishable under Section 161 or Section 165, I. P. C. shall be a competent witness for defence is new, it is not without precedents. Section 340(2) of the Code is to the effect that "any person against whom proceedings are instituted--under Section 107 or under Chap. X..... may offer himself as a witness in such proceedings."

So far as I am aware, such a person is never informed by any Magistrate that he may offer himself as a witness in the proceedings and it has never been decided by any Court that his failure to do so is even an irregularity. The Code of Criminal Procedure is exhaustive, and where the Legislature has intended that a Court must inform an accused that he possesses a certain right, it has said so expressly.

Besides Section 371(3) cited by our learned brother, there was Section 447 which made it incumbent upon a Magistrate, if he found that the case was or might be held to be a case which ought to be tried under the provisions of Chap. XXXIII, to in-form the accused of his rights under the Chap-ter. Section 534 expressly laid down that no conviction could be set aside on the ground of a Magistrate's failure to comply with that provision. There was thus not only an express provision requiring a Magistrate to inform an accused that he possessed a certain right but also the Legislature did not intend that his failure to inform him vitiated the conviction.

Chapter XXXIII and Section 534 have been omitted by Act 17 of 1949 but that has no effect on the reasoning.

When the Legislature did not make it obligatory upon a Magistrate to inform a person who is being proceeded against under Section 107 of the Code or under Chap. X etc. that he may offer himself as a witness in the case, there is no reason to think that it intended that the Court should inform a person who is being proceeded against under Section 161 or Section 165, I. P. C. that he may offer himself as a witness in the ease. A Court's duty, in the absence of a statutory provision, is to interpret and administer the law and not to make people acquainted with it. Therefore, the fact that the Act is a recent one and makes a departure from the old law is no justification for our laying down that a Court is bound to inform the person who is being tried under Section 161, or Section 165, I. P. C. that he can give evidence for the defence. A Court may inform him of his right, but is certainly not

bound to do so.

Reference to the presumption that can be drawn in such a case under Section 4, Prevention of Corruption Act does not seem to be of any relevance; that presumption simply provides proof of an ingredient of the offence of Section 161 or Section 165. If the offence is proved against an accused, the onus of rebuttal is always upon him and merely because the onus of rebuttal of the presumption drawn under Section 4 is upon the accused, it cannot be contended that he must be informed of his right to offer evidence for himself. The presumption supplies the proof of the motive or intention for doing the act of accepting or attempting to obtain any gratification.

But the offence of Section 161 or Section 165, I. P. C. is not the only offence in which a relevant fact is within the exclusive knowledge of the accused; whenever there is a question of an intention or motive for doing a criminal act, the matter is within the exclusive knowledge of the person accused of doing it and he is the best person to give evidence about it. I do not understand why, merely because only in a case under Section 161 or Section 165 the accused is given the right to offer himself as a witness, it should be laid down that the Court is under a duty to inform him of the right.

12. Not only do I see nothing in the Prevention of Corruption Act which would imply an obligation upon the Court to inform an accused of the right conferred by Section 7, but also I find reasons to the contrary. The Act has not affected the provisions of the Code regarding the trial of cases. An offence under Section 161 or 165 is triable as a warrant case and the pro-edure laid down in Chap. XXI of the Code is to be followed. The duties of the Magistrate to the accused are mentioned in Section 256; he has to ask him whether he wishes to cross-examine any prosecution witness, to recall such of them, as he wishes to cross-examine and to call upon him to enter upon his defence. The case may be committed to a Court of Session for trial and the Sessions Judge's duties to the accused are mentioned in Section 289; he has to ask him whether he means to adduce evidence and to call upon him to enter upon his defence.

Under Section 342 the Court is required 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. Whatever a person accused of! an offence under S, 161 or Section 165 can say on oath under Section 7 of the Act, can be said by him during his examination under Section 342. The answers given by him may be taken into consideration as laid down in Section 342(2). When it is for an accused himself to ascertain his rights and the law simply requires the Court to examine him so that he may have an opportunity of saying whatever he wants to say, it means that the Court is not obliged to inform him that he has a right to offer himself as a witness in defence.

13. The provisions of Section 7 of the Act have been borrowed from the Criminal Evidence Act, 1898, (61 and 62 Vic. Ch. 36) Section 1, which reads as follows:

> "Every person charged with an offence, ...
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> shall be a competent witness for the defence at every stage of the proceedings. Provided as follows:

(a) A person so charged shall not be called as a witness in pursuance of this Act e'xcept upon his own application:

(b) The failure of any person charged with an offence to give evidence shall not be made the subject of any comment by the prosecution: .....

(h) Nothing in this Act shall affect the provisions of Section 18, Indictable Offences Act, 1848, or any right of the persons charged to make a statement without being sworn."

It is said that there grew a practice in England of the Court's informing the accused of the right thus conferred. The Criminal Justice Act, 1925 (15 George the 5th Ch. 86) Section 12, which replaced Section 18, Indictable Offences Act, 1848 (11 and 12 Vic. c. 42), provided that the examining Justices after the last prosecution witness was examined should read the charge to the accused and "inform him that he has the right to call witnesses and, if he so desires, to give evidence on his own behalf." In spite of the practice and in spite of the statutory provision making it obligatory upon the examining Justices to inform the accused of his right to give evidence on his own behalf, the Indian Legislature, when it enacted the Prevention of Corruption Act, did not enact any provision making it obligatory upon the Court to inform the accused of the right conferred by Section 7 and did not amend the abovementioned provisions of the Code of Criminal Procedure. One can legitimately infer that the Legislature did not intend to cast an obligation upon the Court to inform the accused of the right conferred by Section 7.

14. The English rule, as stated in Arch-bold's Criminal Pleading, Evidence and Practice, 29 Edn., p. 466, is that the accused ought to be distinctly fold by the Court of trial that he has a right to give evidence on his own behalf and that its failure to so inform him does not of itself necessarily invalidate the trial though where it is unsatisfactory in other respects, the failure may lead to the conviction being quashed. Roscoe writes in his Criminal Evidence, 16th edn. p. 278, that the usual practice is that the Judge informs an undefended person of his rights of defence. According to Phipson on Evidence, 9th edn., p. 473, the Court ought in all cases to inform the accused of his right to give evidence and if it fails to do so, the conviction will be quashed, unless so substantial miscarriage of justice has occurred.

In -- 'R. v. Mack', (1908) 1 Cr. App. 132 (C), Mack, who was undefended and had pleaded alibi, was not invited by the Court to go into the box and the Court of Criminal Appeal refused to quash his conviction. The Lord Chief Justice observed that a person who sets up an alibi and does not go into the box cannot ordinarily expect a retrial. In -- 'R. v. Warren', (1909) 2 Cr. App. 194 (D), there were two flaws in the trial; one was that the Court did not sufficiently direct the jury about the evidence of an accomplice and the other, that it did not tell the accused that he had a right to give evidence. So his conviction was quashed. Channell J., however, added that he was not sure that he would have quashed the conviction on the second ground alone.

In -- 'R. v. Yeldham', (1922) 17 Cr. App. 18 (E), Mrs. Yeldham who was tried along with her husband on a charge of murder, was not given an opportunity of giving evidence or oil making a statement

and was never told of her rights, though she was unrepresented, still her conviction was not quashed. In argument her counsel said that where an accused is not informed of his right the omission does not necessarily invalidate the trial (sic). The Lord Chief Justice took into account the facts that she had seen her husband go into the witness-box and give evidence, that she had made a long and detailed statement which was read by the Court to the jury and that there was no suggestion in her notice of appeal that she had suffered in any way though not having given evidence. He observed that the satisfactory course is that an accused's attention should be pointed to his right to give evidence or make a statement.

In -- 'R. v. Graham', (1922) 17 Cr. App. 40 (F) the conviction was quashed because the summing up was not so full and so explicit as it should have been and the accused was not given an opportunity of calling witnesses. The conviction was not quashed merely because he was not told that he could give evidence himself. In -- '(1927) 20 Cr. App. 150 (B)' not only was the accused not told that he could give evidence if he wished, but also immediately the evidence for the prosecution was finished the Court proceeded to sum up the case to the jury and did not inform the accused even of his right to make an unsworn statement. The evidence against the accused, so far from being overwhelming, was such that he had a real defence which the jury should have considered. In the circumstances, the conviction was quashed. Thus even in England, though there was the practice of the Court's informing the accused of his right to give evidence for himself, his conviction was not quashed merely on account of its failure and the failure was not taken to amount to miscarriage of justice in every case.

The practice of English Courts does not bind Indian Courts. It is not known how the practice grew in England; Shri B. S. Darbari threw no light on the subject and my researches did not yield much fruit. It would be quite wrong for Indian Courts to follow the English practice without knowing the circumstances which gave rise to, and justified, the practice. For all one knows, some of those circumstances may not exist in India. It is stated by Roscoe in his Criminal Evidence at p. 277 that the fundamental principle of the Common Law being that all evidence must be sworn, the Court discouraged any statement by an accused and that any state-

ment which he made was for centuries theoretically a nullity. Though the Indictable Of-

fences Act, 1848, Section 18 and the Summary Juris-

diction Act 1848 (11 and 12 Viv. c. 43) Section 1 required the Courts to hear the accused anf examine the witnesses produced by him the Common Law rule which treated unsworn statement as a nullity might have had some-

thing to do with the practice.

The Criminal Evidence Act of 1898 prohi-bited the prosecution from commenting upon the accused's failure to go into the witness-box and give evidence for himself but permitted the Court to comment upon it; see Roscoe p. 278, Phipson p. 473 and Archbold p. 467. Section 7 (b), Prevention of Corruption Act lays down that no presumption can be drawn adverse to an accused from his

failure to go into the witness box, but there was no such law. in England. It may be that because an adverse presumption could be drawn in England, the practice grew of the Court's informing the accused of his right. There an accused would suffer on account of his failure but not in India.

15. Coming to Indian authorities, two have been brought to our notice; -- 'Rex v. Promod Chandra (A)' and -- 'Mahfuz Ali v State', AIR 1953 All 110 (G). In the former case our brother Mootham (with whom Wanchoo J. agreed) said on page 548 that a Court's failure to inform an accused person charged with an offence punishable under Section 161 or Section 165, Penal Code of his right to give evidence on oath "is a grave irregularity", the effect of which must depend on whether, in the opinion of the appellate Court, it has in fact occasioned a failure of justice. Our learned brother regarded the right "of the highest value to an innocent person" and "one which the Court must be jealous to safeguard."

The right may be of great value to the accused and the Court may have to be jealous to safeguard it, but with great respect, I do not see how it follows that the Court must inform the accused that he possesses it. It is for him to know what his rights are and to seek to exercise them; the Court's duty is to see that he has every reasonable opportunity of exercising them and nothing more. In my opinion, the failure of a Court to inform an accused of the right conferred by Section 7 of the Act is not an irreg-

larity and on this point we must overrule the above decision. In the other case, decided be(sic) one of us, it was stated that Section 7 does not c(sic) any obligation on the Court to invite the ac-

cused to offer himself as a witness. I respectfully agree with that view. My answer to the question is "No".

Malik, C.J.

16. I agree.

Mukerji, J.

17. I agree and have nothing to add.