

APPELLATE CRIMINAL

Before Mr. Justice Dixit and Mr. Justice Chainani.

STATE v. NAGINDAS MAGANLAL.*

1951
Oct. 10.

Criminal Procedure Code (Act V of 1898) ss. 263, 264, 350, 354, 355—Summary trial—Evidence partly recorded by one Magistrate and partly by his successor—First Magistrate taking notes of evidence and making them part of record—Whether succeeding Magistrate is entitled to rely upon those notes of evidence.

Where in a summary trial held under s. 263 of the Criminal Procedure Code, 1898, the evidence is recorded partly by one Magistrate, who having taken notes of evidence makes them part of the record of the case, and partly by his successor, the succeeding Magistrate may act on the notes of evidence made by his predecessor and decide the case upon the evidence recorded by his predecessor as well as the evidence recorded by himself.

CRIMINAL REFERENCE under s. 438 of the Criminal Procedure Code, 1898, by V. R. Shah, Additional Sessions Judge, Surat, against the order of conviction and sentence passed by S. B. Patel, Stipendiary Magistrate, First Class, Surat.

On June 26, 1950, the Food Inspector of Surat Borough Municipality purchased $\frac{3}{4}$ lb. of milk from one Nagindas Maganlal (accused), a milk vendor. The milk was then sent for analysis to the Public Analyst who reported that it was adulterated with water to the extent of 7 per cent. The accused was thereupon prosecuted under s. 4 (1) (b) of the Bombay Prevention of Adulteration Act, 1925.

The trial commenced as a summary trial before Mr. J. B. Solomon, Stipendiary Magistrate, First Class, Surat, who heard the evidence of the complainant and took the statement of the accused on November 17, 1950. Mr. Solomon took notes of the evidence recorded by him and those notes were made part of the record of the case. Thereafter he was transferred and succeeded by Mr. S. B. Patel. Mr. Patel continued the trial in a summary manner as before from the stage where it was left by his predecessor and heard the defence witnesses from November 27, 1950, onwards. Relying upon the evidence thus partly recorded by his predecessor and partly by himself he convicted the accused of the offence charged on January 10, 1951, and sentenced him to pay a fine of Rs. 50, in default to suffer 15 days' simple imprisonment.

* Cri. Ref. No. 104 of 1951 (with Ref. No. 87 of 1951).

The accused having applied in revision to the Additional Sessions Judge of Surat, the learned Judge was of the opinion that there was an illegality on the part of Mr. Patel in proceeding further with the trial from the stage at which it was left by Mr. Solomon, and the conviction and sentence passed against the accused ought to be set aside. He, therefore, referred the case to the High Court with a recommendation that the accused should be retried for the same offence.

The reference was heard.

C. K. Shah, for the Government Pleader, for the State.

Y. V. Chandrachud, (*amicus curae*) for the accused.

DIXIT J. This reference raises a question of procedure of some importance. The facts leading up to the reference are shortly these.

One Nagindas Maganlal was prosecuted before the Stipendiary First Class Magistrate, Surat, for an offence under s. 4 (1) (b) of the Bombay Prevention of Adulteration Act, 1925. Upon the evidence adduced, the learned Magistrate convicted the accused under s. 4 (1) (b) of the Act and sentenced him to pay a fine of Rs. 50, in default, to suffer simple imprisonment for fifteen days. From that order of conviction and sentence the accused made an application in revision before the Sessions Court, Surat, and the learned Additional Sessions Judge has made this reference, asking that the conviction and the sentence recorded against the accused should be set aside and that the accused should be re-tried for the same offence. In coming to this conclusion the learned Additional Sessions Judge considered that there was an illegality in the proceedings, because the case which was a summary case was tried partly by Mr. Solomon who was succeeded by Mr. Patel who subsequently heard the evidence and recorded the conviction against the accused. The learned Judge referred to the relevant sections contained in the Code of Criminal Procedure and also referred to relevant decisions upon that point. He referred to *Emperor v. Chimanlal*,⁽¹⁾ to *In re Tippanna*,⁽²⁾ to *Emperor v. Hemandas*⁽³⁾ and to *Emperor v. Durgaprasad*.⁽⁴⁾

The facts of the case lie, I think, within a narrow compass. It appears that Mr. Solomon, when the proceedings commenced before him, recorded the evidence of the complainant and

⁽¹⁾ (1927) 29 Bom. L. R. 710.

⁽²⁾ (1933) 36 Bom. L. R. 212.

⁽³⁾ [1936] A. I. R. Sind 40.

⁽⁴⁾ [1940] A. I. R. Nag. 239.

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took the statement of the accused. After he was transferred and succeeded by Mr. Patel, Mr. Patel subsequently recorded evidence which was led on behalf of the defence and Mr. Patel recorded the conviction, both upon the evidence recorded by him and upon the notes of evidence kept by his predecessor.

The contention taken on behalf of the accused is that this procedure is illegal. The sections which have a bearing upon the question are ss. 263, 264, 350, 354 and 355 of the Code of Criminal Procedure. The present was a summary trial and it will be governed by s. 263 because in this case there is no appeal. Section 263 provides that in cases where no appeal lies, the Magistrate or Bench of Magistrates, need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter in such form as the State Government may direct the particulars stated in the section. The two particulars which need be mentioned are contained in cls. (h) and (i). Clause (h) refers to the finding, and in the case of a conviction, a brief statement of the reasons therefor, and cl. (i) refers to the sentence or other final order to be made. Under s. 263 a Magistrate need not record the evidence of witnesses, i.e., he is not required to record the evidence of witnesses. Section 263 is, therefore, permissive. At any rate, there is no prohibition in s. 263 if a Magistrate records the evidence of witnesses. Section 264 applies to cases tried summarily in which there is an appeal. The section runs as follows:

"In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record a judgment embodying the substance of the evidence and also the particulars mentioned in s. 263.

(2) Such judgment shall be the only record in cases coming within this section".

Section 264 shows clearly that what a Magistrate is required to do is to record a judgment which should embody the substance of the evidence and sub-s. (2) of s. 264 provides that such judgment shall be the only record in cases falling within the section. Section 264 (2), therefore, suggests that a Magistrate is not required to record evidence but that he is required to record a judgment embodying the substance of the evidence. Then reference has to be made to s. 350. Section 350 occurs in Chapter XXIV and the provisions apply to any inquiry or trial. Section 350 refers to a case where a

Magistrate having heard and recorded the whole or part of the evidence ceases to exercise jurisdiction and he is succeeded by another Magistrate and in such a case the section provides that the Magistrate succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself. There is a proviso to s. 350 (1) and it says that in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them to be re-summoned and re-heard. The proviso, therefore, shows that it is open to an accused person to apply to the Magistrate saying that the witnesses should be re-summoned and should be re-heard. Then there is s. 354 which provides that in inquiries and trials (other than summary trials) under the Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded "in the following manner". It is clear from s. 354 that s. 354 does not apply to summary trials. Section 354 is succeeded by s. 355 and according to s. 355, that section speaks of a record in summons cases and in trials of certain offences by the first and Second Class Magistrate. Now, the language of s. 355 shows that in cases governed by s. 355 a Magistrate is bound to make a memorandum of the substance of the evidence. Section 263 speaks of recording of evidence which is permissive and s. 264 speaks of recording a judgment embodying the substance of evidence. Now, the expression "the evidence of the witnesses shall be recorded *in the following manner*" as used in s. 354 has, I think, a technical meaning and that technical meaning is to be gathered from s. 355 because according to s. 355 the Magistrate has to make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds. This provision is unlike the provision contained in either s. 263 or s. 264.

In this particular case Mr. Soloman recorded the evidence of the complainant and made notes of evidence as part of the record of the case. There is no prohibition in s. 263 by which a Magistrate is not to make a memorandum of the substance of the evidence. Under s. 263 it is a discretionary act, whereas under s. 355 it is a statutory obligation. That Mr. Soloman took notes of evidence and made them part of the record of the case is not disputed upon this reference. But the contention which has been taken on behalf of the accused by Mr. Chandrachud is that the notes of evidence made by

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Mr. Soloman constituted his private property and so his successor Mr. Patel was not entitled to act upon that evidence. As I said, s. 350 refers to an inquiry or trial and is expressed in general terms, so that even a summary trial may come within the operation of s. 350. But the point which requires decision is whether when in a summary case the evidence has been recorded partly by one Magistrate who has taken notes of evidence and made them part of the record of the case and when that Magistrate is succeeded by another Magistrate, the successor can act upon the notes of evidence made by his predecessor. If the notes of evidence are private property in which case the succeeding Magistrate cannot act upon the notes of evidence taken by his predecessor, then in such a case if the successor acts upon the evidence, the procedure would be illegal. In this particular case the accused did not choose to take advantage of the proviso to s. 350 (1), and that suggests that he was willing to have the notes of evidence made by Mr. Soloman to be considered as evidence in this case.

But the point taken by Mr. Chandrachud is that according to the true view as explained in decisions to which I will now refer, the notes of evidence made by a Magistrate under s. 263 constitute his private property. Support to this argument is derived from a decision of this Court reported in *Emperor v. Chimanlal*⁽¹⁾ and from a subsequent decision of this Court reported in *In re Tippanna*.⁽²⁾ The case in *Emperor v. Chimanlal*⁽¹⁾ was a case which fell within s. 264 and that case lays down that the notes of evidence, if made by a Magistrate in cases in which an appeal lies, do not form part of the record under s. 264 (2). It will appear from the judgment that in that case a Bench of Magistrates had taken notes of evidence which were subsequently destroyed and the point taken on behalf of the accused was that the Bench Magistrates ought to have taken the notes of evidence and should have made them part of the record of the case. This contention was rejected by Mr. Justice Patkar. The case reported in *In re Tippanna* was a case in which the Honorary First Class Magistrate had made an order of acquittal. The learned Magistrate had taken down notes of evidence of witnesses for his own guidance and wrote a judgment acquitting and discharging the accused under s. 258 of the Criminal Procedure Code. What happened was that in that case the learned Magistrate made an order directing the complainant to pay

⁽¹⁾ (1927) 29 Bom. L. R. 710.

⁽²⁾ (1933) 36 Bom. L. R. 212.

compensation to the accused under s. 250 of the Code of Criminal Procedure and it is under those circumstances that the question arose for decision as to whether the notes of evidence which were kept by the Magistrate for his own guidance should be regarded as part of the record of the case. Sir John Beaumont who delivered the judgment of the Court in that case observed that neither s. 263 nor s. 264 required a Magistrate to record evidence in the case. That, I think, is clear from the language of the sections themselves. He also observed that s. 355 which immediately follows s. 354 introduces the sections providing how in trials other than summary trials the evidence is to be recorded, and he took the view that s. 354 appeared to him clearly to limit the operation of s. 355 and that in summary cases the recording of evidence was governed by ss. 263 and 264 of the Code and s. 355 of the Code had no application to summary cases. It is to be noted that in that case Sir John Beaumont was considering a case reported in *Satish Chandra Mitra v. Manmatha Nath Mitra*⁽¹⁾ and also a case reported in *Emperor v. Mantu Tiwari*⁽²⁾ and he came to the conclusion that the view of the Allahabad High Court was to be preferred to that of the Calcutta High Court. In the Allahabad case the view taken was that in a case which is governed either by s. 263 or by s. 264 a Magistrate is not bound to record evidence and the notes of evidence, if taken by the Magistrate, constitute his private property. This view was not accepted in Calcutta and Sir John Beaumont considered that the Allahabad view was to be preferred to the Calcutta view.

The learned Additional Sessions Judge has referred to the Sind case as well as to the Nagpur case and left to himself, he has expressed his preference for the view taken by the Sind Court. The head note to that case runs as follows:

"Section 263 does not prevent a Magistrate who tries a case in a summary way from recording evidence. It merely says that he need not, but if he does, it cannot by reason of s. 264 form part of record, and evidence so recorded does not come under s. 350."

The view taken in the Sind case has not received the approval of the Nagpur High Court in a decision reported in *Emperor v. Durgaprasad*.⁽³⁾ A part of the head-note in that case runs as follows:

⁽¹⁾ (1920) 48 Cal. 280.

⁽²⁾ (1926) 49 All. 261.

⁽³⁾ [1940] A. I. R. Nag. 239.

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"Where the prosecution evidence in a summary case was recorded by the Magistrate in extenso in narrative form at least quite as fully as it would have been in a summons case, s. 350 would apply to such evidence."

It is clear, therefore, that there seems to be a difference of opinion upon the question as to whether notes of evidence taken by a Magistrate under s. 263 or s. 264 can be regarded as part of the record of the case. Sir John Beaumont as well as Mr. Justice Patkar seem to take the view that in cases where a Magistrate is not bound to take notes of evidence, the notes of evidence taken should be regarded as the private property of the Magistrate and they do not form part of the record of the case. It is to be remembered that in both these cases the notes of evidence had either been destroyed or not preserved by the Magistrate. In the present case Mr. Soloman took notes of evidence, allowed them to be placed upon the record and made them part of the record of the case. Question, therefore, arises whether it was not open to Mr. Patel to act upon the notes of evidence and to decide the case on the evidence partly recorded by his predecessor and partly recorded by himself. In view of the conflict of opinion, I am prepared to concede that the question is one which is not free from doubt or difficulty. Much can be said in support of the rival views. But inasmuch as s. 263 does not contain a prohibition and as it is permissive in character, it seems to me that if a Magistrate records notes of evidence and makes them part of the record of the case, I do not see why it should be held that in such a case a successor should not be able to act upon that evidence. That is what has precisely happened in this case. It may be that a Magistrate may make notes of evidence and may not make them part of the record of the case. In such a case there is no question that there shall have to be a new trial. But in a case where notes of evidence have been recorded and have been made part of the record of the case, I do not see why a succeeding Magistrate should not be in a position to act upon that evidence and to decide the case both upon the evidence recorded by his predecessor and upon the evidence recorded by himself.

It is to be remembered that in cases governed by s. 263 notes of evidence are taken by a Magistrate either to assist his memory or to refresh his recollection. That is a matter of convenience and I agree that if notes of evidence are

made by a Magistrate merely to assist his memory or to refresh his recollection, there being no obligation upon him to make notes of evidence under s. 263, it is possible that in such a case the Magistrate may destroy the notes of evidence in which case his successor will have to hear the case *de novo*. But if as in this case the notes of evidence have been taken and have been allowed to remain on the record, there is clearly no illegality in so far as Mr. Patel, the successor of Mr. Soloman, acted upon the evidence which had been previously recorded by Mr. Soloman. In all cases which are tried as summary cases under Chapter XXII of the Code of Criminal Procedure, the object of enacting s. 263 and s. 264 appears to be that in cases governed either by one or the other section the Court's time need not be wasted, the cases being petty cases. In such a case a Magistrate may make notes of evidence for the sake of convenience or he may make notes of evidence to assist his memory or to refresh his recollection. That seems to be the idea underlying ss. 263 and 264. But even if that is the idea underlying s. 263, since there is no prohibition in s. 263 by which a Magistrate is prevented from making notes of evidence, I do not see why a Magistrate succeeding should not be in a position to act upon the evidence and to record a conviction upon the basis of the evidence recorded by his predecessor and upon the basis of the evidence recorded by himself. In the present case there has been no prejudice caused to the accused, because the accused did not choose to take advantage of proviso (a) to s. 350 (1) of the Code of Criminal Procedure. Under these circumstances we think that there has been in this case no illegality in the course of the proceedings and consequently the reference will be rejected.

With these observations, we return the papers to the learned Additional Sessions Judge and uphold the order of conviction and sentence recorded by the trial Magistrate.

Reference rejected.

M. W. P.

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