

the power of this Court to maintain professional discipline.

S.K.B.

1914
AN
ATTORNEY,
In re.

Application allowed.

Attorney for the Public Prosecutor: *C. H. Kesteven*
(*the Government Solicitor*).

[*Note.*—A petition was subsequently presented to the Privy Council, on behalf of the attorney, for special leave to appeal; but their Lordships of the Judicial Committee refused the application mainly on the ground that it was a criminal matter. ED.]

CRIMINAL REVISION.

Before Holmwood and Sharfuddin JJ.

1914
Jan. 9.

MAHOMED HOSSAIN

v.

EMPEROR.*

Summary Trial—Warrant Case—Omission to examine the accused—Charge—Accusation of house breaking by night to commit theft—Finding of different intent—Necessity of charge specifying the same—Criminal Procedure Code (Act V of 1898) ss. 263, 342.

Section 263 of the Criminal Procedure Code is governed by s. 342, and there must, therefore, be an examination of the accused in all warrant cases; the words "if any," in cl. (g) of the former section, not being applicable to such cases.

Where the case against the accused is one of theft or house-breaking to commit theft, and the Magistrate finds that it has broken down but that there is another object apparent on the evidence, it is his duty to give the accused notice of that by drawing up a charge clearly stating what it is that he is accused of doing.

THE petitioner was tried, under the summary form of procedure, before Babu N. Roy, Deputy

* Criminal Revision, No. 1950 of 1913, against the order of J. C. Twidell, Sessions Judge of Chittagong, dated Nov. 28, 1913.

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Magistrate of Chittagong, and convicted, on the 25th November 1913, under section 456 of the Penal Code, and sentenced to two months' rigorous imprisonment.

The case for the prosecution, as alleged in their evidence, was that, on the night of the 28th August 1913, the accused, a merchant and contractor at Chittagong, forcibly entered the house of the complainant Thanda Meah, a jetty clerk, in the same town, with intent to commit theft. It was, however, brought out in the cross-examination of the prosecution witnesses, that there was familiarity between the accused and a woman in the complainant's house. The material portion of the Magistrate's judgment is as follows:—

"It is no doubt true that both the parties are in affluent circumstances. This brings me to the motive for the house trespass. From the deposition of witnesses it is amply clear that it is not theft, but it was outraging the modesty of the wife of the owner of the house. The intention cannot be found directly but can only be judged by circumstances. It is not the case of the accused that he had the consent of the woman in this house-trespass. But leaving apart all these things I am of opinion that the forcible entrance into the house, at a late hour of night, by a stranger does constitute annoyance to its owner."

The record of the summary trial stated the offence complained of to be "house-breaking by night, section 456, I. P. C.," and contained no examination of the accused. There was no formal charge drawn up.

The petitioner moved the Sessions Judge of Chittagong to refer the case to the High Court, but the application was rejected on the 28th November 1913, the learned Judge observing as follows:—

"The trial was summary. The record contains no examination of the accused, as that is not necessary, and there is nothing to show that the accused was not asked to explain the case against him. The presumption is that he was asked."

The petitioner then moved the High Court and obtained the present Rule.

Mr. Gregory (with him *Babu Khitish Chandra Sen*), for the petitioner. Section 342 of the Code is peremptory, and the Magistrate was bound to have examined the petitioner thereunder. The accusation was under section 457 of the Penal Code, but the Magistrate has convicted him under section 456. The accused was prejudiced. He should have been informed what was charged against him.

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HOLMWOOD AND SHARFUDDIN JJ. We are of opinion that this Rule must be made absolute upon the ground on which it was issued. The learned Magistrate in his explanation has shown either ignorance or neglect of the law as clearly laid down in section 342. Section 263 does not give him discretion whether he will examine the accused or not. This is governed by section 342. It gives the accused the right to refuse to say anything if he chooses. But there must be examination in all warrant cases. Therefore, the words "if any" do not apply to warrant cases. Then again the charge was with intent to commit theft, as alleged by the prosecution in their evidence, and in their evidence they did not aver that there was any other reason for the house-breaking. It was the defence which tried to elicit from the prosecution witnesses that there was some familiarity between the accused and a woman in the complainant's house. It is, therefore, on the defence that the conviction rests and not on the prosecution.

There can be no doubt that when the learned Magistrate found that the charge of theft or the charge of house-breaking with a view to commit theft broke down, and it appeared that there was another object, it was his bounden duty to have given the accused notice of that by drawing up a charge clearly stating what it was that he was accused of doing.

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The trial appears to us to have been vitiated by these errors, and the conviction and sentence are, therefore, set aside. We do not order a retrial because the accused has already been 21 days in jail, and we consider that is sufficient to meet the ends of justice in this case. The petitioner will be discharged from his bail unless he is required to answer to any other charge.

E. H. M.

Rule absolute.

APPELLATE CIVIL.

Before Carnduff and Richardson JJ.

1914
 Jan. 13.

HARI CHARAN SAHA

v.

BARAN KHAN.*

Review—Appeal against order granting review of judgment—Civil Procedure Code (Act V of 1908) O. XLIII, r. 1, cl. (w) and O. XLVII, r. 7.

O. XLIII, r. 1, cl. (w), must be read with and subject to r. 7, O. XLVII. An order granting application for review of judgment can only be objected to on grounds specified in r. 7 of O. XLVII.

Jugernath Pershad Singh v. Ram Aular Singh (1) Tripura Charan Kal v. Sorashi Bala (2), Surendra Nath Talukdar v. Sita Nath Dass Gupta (3) referred to.

APPEAL by Hari Charan Saha and others, the defendants.

*Appeal from Order, No. 418 of 1912, against the order of Lal Behari Bhaduri, officiating Subordinate Judge of Backergunge, dated May 3, 1912.

(1) (1911) Mis. A. No. 341 of 1909 (2) (1913) C. Rule No. 123 of 1913
 (Unrep.) (Unrep.).

(3) (1913) Mis. A. No. 188 of 1912 (Unrep.)