the decree awarding possession to the plaintiff to the extent of 6 annas odd share jointly with the defendants Nos. 1, 2 and 3 is correct or ought to be modified. Further, the learned Judge will consider the question as to which party, if any, is entitled to the costs of the Courts below. His findings on the other points are affirmed. After coming to the proper findings on the points mentioned above, the learned Judge will finally dispose of the appeal in accordance with law. Costs of this appeal will abide the result.

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SUFUR MAHOMED v. ASMOT MANDAL.

SUHRAWARDY J.

WALMSLEY J. I agree.

S. M. *Appeal allowed; case remanded.*

CRIMINAL REVISION.

Before C. C. Ghose and Cuming J J.

BINODE BEHARI NATH

v.

EMPEROR.*

1923

June 28.

Accused—Person called upon for security to be of good behaviour not an accused—Omission to examine such person after the close of the prosecution case and before he is called upon for his defence—Irregularity—Prejudice—Criminal Procedure Code (Act V of 1898) ss. 4(o), 110, 117(2), 342 and 537.

Proceedings under Chapter VIII of the Criminal Procedure Code are "inquiries," and not "trials." A person called upon for security, under the Chapter, is not an "*accused*," nor is he guilty of any "*offence*" as defined in s. 4(*o*).

Jhoja Singh v. *Queen-Empress* (1), and *Queen-Empress* v. *Mona Puna* (2) distinguished.

* Criminal Revision No. 330 of 1923 against the order of P. Sen Deputy Magistrate, 24-Parganas, dated March 10, 1923.

(1) (1896) I. L. R. 23 Calc. 493. (2) (1892) I. L. R. 16 Bom. 661.

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Section 342 of the Code does not apply to an inquiry under s. 117. The omission to examine the person called upon for security, at the close of the prosecution case and before he is called on to enter upon his defence, is not an illegality vitiating the conviction, but an irregularity covered by s. 537, when he has not been prejudiced by such omission.

Mazahar Ali v. *Emperor* (1), distinguished.

UPON the receipt of a police report, dated the 29th October 1920, Mr. P. N. Sen, a Deputy Magistrate at Alipore, drew up a proceeding against the petitioner, under s. 110 (*d*), (*e*) and (*f*) of the Code, requiring him to furnish security in the sum of Rs. 300, with two sureties, each in the like amount, to be of good behaviour for two years. The petitioner, in showing cause, filed a written statement denying the allegations in the police report. After a protracted inquiry held subsequently he was bound down, on the 10th March 1922, for the period, and under the conditions stated above. He did not furnish the required security, and the case was accordingly referred, under s. 123(2) of the Code, to the Sessions Judge of the 24-Parganas. The Judge heard the reference and upheld the Magistrate's order, on the 27th February 1923. The petitioner then obtained the present Rule on the ground of non-compliance with the provisions of s. 342 of the Code.

Babu Manmatha Nath Mookerjee, for the petitioner. The petitioner is an "accused" within s. 342: see *Jhoja Singh* v. *Queen Empress* (2), and *Queen Empress* v. *Mona Puna* (3). The section appears under Chapter XXIV which contains provisions relating to all inquiries. Section 342 has been applied to summons cases, and the procedure under s. 110 calling on a person to show cause is analogous.

(1) (1922) I. L. R. 50 Calc. 223. (2) (1896) I. L. R. 23 Calc. 493.
(3) (1892) I. L. R. 16 Bom. 661.

Further, s. 117 (*2*) makes the procedure as to warrant cases applicable to inquiries under Chapter VIII, when practicable. It is quite practicable to examine such person under s. 342.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown. My difficulty is the wording of s. 117(*2*). Except the framing of a charge, all the other procedure under Chapter XXI applies to the inquiry under s. 117. I am not in a position to say that s. 342 does not apply to such inquiry: *Palaniappa Asary* v. *Emperor* (1).

GHOSE J. The facts of this case have been set out in the judgment which my learned brother is about to deliver, and it is, therefore, unnecessary for me to refer to the same again. I have gone through the entire record, and I am satisfied that there are no merits whatsoever in the petitioner's case.

A point has been taken that, inasmuch as the petitioner was not examined under the provisions of section 342 of the Criminal Procedure Code, such an omission has vitiated the entire proceedings. I am not prepared to extend the principle of the case of *Mazahar Ali* v. *Emperor* (2) to inquiries under the provisions of section 110. As far as I can see from the record the petitioner has not been prejudiced in any way by the omission to examine him under the provisions of section 342, and I agree that to send the case back in order that the Magistrate might formally question him under the provisions of section 342 would be a farce. I, therefore, think that the present Rule should be discharged.

CUMING J. The petitioner in this case, one Binode Behari Nath, has been ordered to furnish security

(1) (1910) I. L. R. 34 Mad. 139. (2) (1922) I. L. R. 50 Calc. 223.

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for his good behaviour, under section 110 read with section 118 of the Criminal Procedure Code, by giving a bond himself for Rs. 300, with two sureties for Rs. 300 each, for two years by the Deputy Magistrate at Alipore. As he failed to furnish the necessary securities he has been ordered to suffer rigorous imprisonment for two years by the Sessions Judge at Alipore acting under section 123 of the Criminal Procedure Code.

The Rule has been granted on the ground that the petitioner was not examined, under section 342 of the Criminal Procedure Code, at the close of the case for the prosecution and before he was called on for his defence. The petitioner contends that he is an accused person, that under the provisions of section 117 of the Criminal Procedure Code, the trial should be conducted as a warrant case, and that, therefore, he should have been examined under section 342 at the close of the case for the prosecution and before he was called on for his defence. He contends, relying on the case of *Mazah r Ali* v. *Emperor* (1), that this provision is mandatory, and so the trial is bad in law. He does not contend that he has been in any way prejudiced by the omission. He frankly admits he has not, and on the facts it is clear he has not. He was defended by pleaders and put in a written statement. He contends, however, that in view of the case of *Mazahar Ali* v. *Emperor* (1), the Court should go through the form of examining him before he is called on for his defence. Now the proceeding in which he was called on to give security was not a trial. There is a distinction between a trial and an inquiry.

"Inquiry" includes every inquiry other than a trial conducted by a Magistrate or Court under the

(1) (1922) I. L. R. 50 Calc. 223.

Criminal Procedure Code (*see* section 4 (*k*)). Now the Code describes these proceedings under Chapter VIII as "inquiries." All through the Chapter the expression used is "inquiry": *see* especially section 117 (*2*).

When the Code refers to a trial it uses the word "trial" (*see* Chapters XX, XXI, XXII and XXIII, with special reference to section 241, section 251, section 260 section 262 and section 267). It is clear, I think, therefore, that these proceedings under Chapter VIII are "inquiries" and not "trials."

The petitioner has contended that the person called on to give securities under Chapter VIII is an accused person. The expression "accused" is nowhere defined in the Code. It is to be noted that nowhere in Chapter VIII is the person called on to give securities either under section 106, section 107, section 109 and section 110 referred to as an accused person.

In the Chapters XVIII, XIX, XX, XXI, XXII, and XXIII, which deal with trials and inquiries preliminary to commitment for trial, the expression "accused" is always used to denote the person proceeded against. *Primâ facie* then a person proceeded against under Chapter VIII would not appear to be an "accused" person as the expression is used in the Criminal Procedure Code.

The petitioner would rely on the case of *Jhoja Singh* v. *Queen Empress* (1), which followed *Queen Empress* v. *Mona Puna* (2). In that case the learned Judges held that "accused" meant a person over whom the Magistrate or Court was exercising jurisdiction. With great respect to the learned Judges it would seem that such an interpretation would lead to somewhat startling results. For instance, a witness who is compelled by a summons or a warrant to appear

(1) 1896) I. L. R. 23 Calc. 493 (2) (1892) I L. R. 16 Bom. 661.

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before a Court and then give evidence is clearly a person over whom the Court is exercising jurisdiction, and so a witness would be an "accused" person, and no oath could be administered to him. Be that as it may, the learned Judges were there considering the question as to whether such a person should be considered as an accused person for the purpose of section 340, and, strictly speaking, they decided nothing more. The ruling cannot be held to lay down that for the purposes of section 342 a person called on to give security is an accused person. Looking also at the wording of section 342 itself it would seem very doubtful if the expression "accused" covers the case of a person called on to give security. Sub-section (*3*) states that the answer he gives may be put in evidence against him in any other inquiry into or trial for any other offence, and so presupposes that an accused person is a person accused of an offence. Offence is defined in section 4 (*o*) as an act or omission punishable by any law. A person called on to give security cannot be said to be a person accused of an act or omission punishable by law.

Speaking for myself, I have grave doubts whether a person proceeded against under Chapter VIII is an accused person.

The petitioner has, however, relied on section 117(*2*), which provides that, where the order requires security for good behaviour, the inquiry shall, as nearly as may be practicable, be conducted in the manner prescribed for conducting trials and recording evidence in warrant cases, except that no charge shall be framed. It has been held in the case of *Wazahar Ali* v. *Emperor* (1), that in a trial the omission to examine the accused before he is called

(1) (1922) I. L. R. 50 Calc. 223.

on for his defence is an illegality, the provisions of the section 342 being mandatory. Without expressing any opinion as to the correctness or otherwise of this ruling, I am not prepared to extend its principle to inquiries under section 110. The object of the examination of the accused is to give him an opportunity of explaining any circumstances which may appear against him in evidence. In the present case the petitioner was defended by pleaders, and he put in a written statement. He himself admits that he has not been prejudiced in any way by the omission to formally examine him. In such circumstances to send back the case in order that the Magistrate might formally question him would be an elaborate farce. He would say, and here I speak from experience, that he has nothing to add to his written statement, and any attempt to question him would be stigmatized as cross-examination. In my opinion the omission to examine formally the person called on to furnish security is an irregularity curable under section 537. In the present case the petitioner admits that he has been in no wise prejudiced by the omission, and so clearly it cannot be said that the omission has caused a failure of justice. I would discharge the Rule.

E. H. M.

Rule discharged.