CRIMINAL REVISION.

Before Rankin, Buckland and Cuming JJ.

DIBAKANTA CHATTERJEE

v.

GOUR GOPAL MUKHERJEE.*

1923

May 21.

Accused—Examination of accused—Duty of the Magistrate to examine accused after the cross-examination and re-examination of the prosecution witnesses in a warrant case—Examination of the accused only after the examination-in-chief of the prosecution witnesses, not a compliance with the law—Criminal Procedure Code (Act V of 1898), s. 342.

The word "examined," in s. 342 of the Criminal Procedure Code, includes cross-examination and re-examination. The omission to examine the accused after the cross examination and re-examination of *all* the prosecution witnesses vitiates the trial and conviction.

The examination of the accused, only after the examination-in-chief of the prosecution witnesses, is not a compliance with the provisions of s. 342.

Re-trial directed from the point at which the examination under s. 342 should have taken place.

On 31st May 1922, one Gour Gopal Mukherjee lodged a complaint, under s. 500 of the Penal Code, against the petitioner, and the trial came on before S. C. Mitter, a Deputy Magistrate at Hooghly. The complainant and five prosecution witnesses were examined-in-chief on the 7th July 1922. Five other prosecution witnesses were examined-in-chief on the 20th, and the examination of the accused took place on the same day. On the 7th August a charge was framed, and the cross-examination commenced. The accused was not examined after the close of the cross-examination. He was convicted, on 18th September, and sentenced to a fine.

*Criminal Revision No. 262 of 1923, against the order of S. C. Mullick, Sessions Judge of Hooghly, dated Jan. 10, 1923.

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The case was heard before Buckland and Cuming JJ. who differed in opinion, and their Lordships delivered the following dissentient judgments :—

BUCKLAND J. The point involved in this Rule has come before the Court recently on several occasions, and it arises upon the interpretation to be given to section 342 of the Criminal Procedure Code. The complainant and five witnesses for the prosecution were examined-in-chief on the 7th July 1922. On the 20th July 1922 five other witnesses for the prosecution were examined-in-chief. The accused was then examined under section 342. On the 7th August a charge was framed. No further witnesses for the prosecution were examined-in-chief, but on that and on subsequent dates the witnesses for the prosecution were cross-examined. On the 18th September six witnesses for the defence were examined. The question is whether or not the obligatory examination of the accused under section 342 of the Criminal Procedure Code should have taken place after the witnesses for the prosecution had been cross-examined.

It has been submitted to us that, inasmuch as there was no examination of the accused under that section after the witnesses for the prosecution had been cross-examined and before he was called upon to enter upon his defence, the provisions of the section have not been complied with. In point of fact the accused was examined after the witnesses for the prosecution had been examined-in-chief and before he was called on for his defence. But the contention is that the word "examined" in section 342 includes cross-examinations, and that, in consequence, the provisions of the section have been contravened.

We have been referred generally to recent decisions of this Court and particularly to the judgment in *Mazahar Ali* v. *Emperor* (1) in which the learned Chief Justice, referring to the words of the section, said : "That must mean after the witnesses for the prosecution "have been examined, and after the cross-examination and re-examination, "if any, of such witnesses, for ordinarily the accused is not called on for "his defence until the case for the prosecution is closed." I do not understand that by this it is necessarily meant that the word "examined" includes cross-examination and re-examination if any. It seems to me that the decision is based upon broader grounds, for a few lines earlier in the judgment I find it stated :—"In my judgment it is clearly indicated in "that part of the section that the time at which the Court shall question "the accused generally on the case is after the prosecution case is com- "pleted and before the accused person is called on for his defence."

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I agree with this conclusion, and I desire to state my reasons with reference to the procedure laid down in Chapter XXI for the trial of warrant cases. Section 252 provides for the examination of the complainant and of witnesses for the prosecution in the first instance. As regards them it is open to the defence to cross-examine them, if they choose to do so, as they are called or to reserve the cross-examination until the opportunity provided later. When those witnesses have been examined, or at any previous stage of the case, which means before they have all been examined, the Magistrate under section 254 is entitled to frame a charge in writing against the accused. The charge is then read and explained to the accused, and he is asked to plead to it. Then, if he does not plead guilty or has to be tried, the accused is given an opportunity of cross-examining the witnesses for the prosecution whose evidence has already been taken, and after those whom he desires to recall for that purpose have been cross-examined and re-examined, they are discharged. Next the evidence of the remaining witnesses for the prosecution is taken, and after cross-examination and re-examination they too are discharged. There the case for the prosecution closes, and it is at that stage and before the accused is called upon to enter on his defence, which is the next stage, that the obligatory examination of the accused under section 342 should take place.

There may, therefore, be cases where all the witnessses for the prosecution are examined before a charge is framed, and they are only cross-examined thereafter, and cases where additional witnesses are called for the prosecution after a charge has been framed.

With regard to trials in which such additional witnesses are called for the prosecution, in my opinion, which I might have to reconsider if the point directly arose for decision at any further time, such additional witnesses for the prosecution should be cross-examined and re-examined one by one as they are called. As regards witnesses called before a charge is framed an opportunity is provided to them for cross-examination, but there is no such provision as regards the additional or remaining witnesses for the prosecution. Failure to observe this procedure is one source of error with regard to questioning the prisoner under section 342 of the Criminal Procedure Code. But if the additional witnesses for the prosecution are examined-in-chief, cross-examined and re-examined one by one, then, as a matter of course, it will follow that the stage at which the Court shall question the accused generally on the case will be after the prosecution case is complete and before the accused is called on for his defence, and no question can possibly arise as to whether the word "examined" in section 342 does or does not include the word "cross-examined".

In cases, however, where no additional witnesses are called after a charge has been framed, errors in the observance of section 342 are even

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more frequent. As to these cases the procedure laid down, even if followed with the utmost precision, does not lead with the same directness to the point, of which sight cannot be lost, at which the obligatory questioning of the accused must take place. The reason for this is that if the accused is questioned after the witnesses for the prosecution have been examined-in-chief, but before they are cross-examined, and also, of course, before he has been called on for his defence, the terms of the section, so far as they require him to be questioned "after the witnesses for the prosecution have "been examined and before he is called on for his defence," have been complied with unless the word "examined" is held to include "cross-"examined". But this is not all that the section says. The words quoted indicate that the accused is to be questioned at least after all the witnesses for the prosecution have been examined-in-chief, and I know of no case where it has been argued that the section is not contravened if witnesses for the prosecution are examined-in-chief after the accused has been examined, and he is not again questioned before he is called on for his defence. The section also provides that the accused shall be questioned "generally on the case," and to hold that to question him before the witnesses for the prosecution have been cross-examined is sufficient is to lose sight of this very important phrase. For it may well be that circumstances demanding explanation have been elicited by the cross-examination, and, whether that is so or not, it cannot by any stretch of language be said that to question the accused for the purpose of enabling him to explain the examination-in-chief but to give him no opportunity to explain any or even only a part of the cross-examination of the witnesses for the prosecution is to question him generally on the case. This reasoning applies equally to cases where additional witnesses for the prosecution are called after a charge has been framed, but for reasons which I have given its application to such cases should be unnecessary.

For these reasons I am of opinion that in all cases, whether additional witnesses are called after a charge has been framed or not, the obligatory examination of the accused, under section 342, should take place after all the witnesses for the prosecution have been examined and cross-examined and before he is called on for his defence.

Before I conclude I should say that my judgment is not intended, by such general observations as I have made, to suggest that, where in his discretion the Judge or Magistrate rightly permits a witness or witnesses for the prosecution to be called or cross-examined after the accused has been called on for his defence, a further examination of the accused under this section must take place. The section only deals with an obligatory examination of the accused before he is called on for his defence, and should any such question arise hereafter the point will then have to be decided.

In my judgment this Rule should be made absolute, and the order of the trial Court, dated the 15th November 1922, should be set aside and the trial should be resumed by the Magistrate from that point at which the obligatory examination under section 342 should have taken place.

As my learned brother dissents, the case will have to be referred under section 429 of the Criminal Procedure Code.

CUMING J. I would discharge this Rule. The Rule was granted on the ground that, in the absence of examination of the petitioner according to the mandatory provisions of section 342 of the Criminal Procedure Code, the conviction of the petitioner cannot be sustained. From the body of the petition it appears that it is alleged that the provisions of the section were not complied with in that the accused person was not examined after the cross-examination of the prosecution witnesses, and it would appear from the order sheet that this was so. It appears that after the examination of the prosecution witnesses-in-chief the accused was examined, and the prosecution witnesses were subsequently cross-examined. In my opinion and with great respect to the learned Judges who decided the case of *Mazahar Ali* v. *Emperor* (1) this was a sufficient compliance with the provisions of the section. Section 342 states: "For the purpose "of enabling the accused to explain any circumstances appearing in the "evidence against him, the Court may, at any stage of any enquiry "or trial, without previously warning the accused put such questions "to him as the Court considers necessary, and shall, for the purpose "aforesaid, question him generally on the case after the witnesses for "the prosecution have been examined and before he is called on for his "defence." As I read the section the expression "examined" means examination-in-chief, and does not include cross-examination or re-examination of the prosecution witnesses. A perusal of the Code will show that the Code apparently contemplates three distinct stages in the examination of the witness—his examination, his cross-examination and his re-examination—and where the Code uses the expression "examined" in section 342 it seems to me that the Code intended to refer to examination and not necessarily to cross-examination or re-examination; in other words, the expression "examined," as set out in section 342, does not include cross-examination or re-examination. My reasons are these. Consider for instance the sections dealing with the trial of warrant cases.

Section 252 provides that the Magistrate will hear the complainant and take all the evidence which may be produced in support of the prosecution. After taking their evidence the Magistrate examined the accused under section 253. The Magistrate may then either discharge him or frame a charge.

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The charge could be framed previously at any stage under section 254, but as soon as the charge is framed the accused is called on to cross-examine the witnesses for the prosecution who have already been examined. They are then re-examined, if necessary, and discharged The remaining witnesses for the prosecution are then examined, cross-examined and re-examined. The accused then is called on to enter on his defence. Section 257 provides for the accused recalling and cross-examining prosecution witnesses after he has entered on his defence.

It will be noticed that the different stage, examination, cross-examination and re-examination, may take place at different times. These sections set out the procedure to be followed in warrant cases, and after section 253, which alone provides for the examination of the accused, no mention whatever is made of such examination. No doubt the Code contemplates in certain cases further witnesses for the prosecution being examined after the charge, and reading section 342, which is in the general provisions for trials, the accused must also be examined after these witnesses have been examined in order that he may explain anything that may appear against him in their evidence. Now, if the object of the examination is to allow the accused to explain anything which may appear against him in the evidence of the prosecution, there would be no necessity to examine him after the cross-examination for the object of the cross-examination is, I understand, to destroy the evidence for the prosecution and in itself to explain away facts which might appear against the accused. I am, therefore, of opinion that the expression "examined" in section 332 refers to the examination-in-chief of the prosecution witnesses, and does not include their cross-examination or re-examination, and that, therefore, in the present case the requirements of the Code have been complied with.

Owing to this difference of opinion, the case was referred to Rankin J.

Babu Narendra Kumar Bose (with him *Babu Jagnessur Mazumdar*), for the petitioner cited the decision of Rankin J in *Pramatha Nath Mukerjee* v. *Emperor* (1).

Babu Bebendra Nath Mandal for the opposite party. The words "before he is called on for his defence," in section 342, really mean "he shall be asked

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whether he is guilty or has any defence to make" in section 255, and are not equivalent to the words "called upon to enter upon his defence" in section 256 and the similar expression in section 289. The Code uses the word "examination" in contra-distinction to "examination and re-examination".

Babu Narendra Kumar Bose, in reply, referred to s. 137 of the Evidence Act.

RANKIN J. In this case the accused person was standing his trial in a warrant case on a charge under section 500 of the Indian Penal Code. After the prosecution witnesses had been examined-in-chief, the accused was questioned generally on the case by the Magistrate. Thereafter cross-examination of the prosecution witnesses took place, and the objection now under consideration is this: that section 342 of the Criminal Procedure Code, was not complied with, as after the cross-examination of the prosecution witnesses the accused was not again examined generally on the case in terms of the section. The view taken by Mr. Justice Buckland, following the decision in *Mazahar Ali* v. *Emperor* (1), was that in those circumstances the provisions of section 342 had not been complied with: the requirements of the section being that, after the witnesses for the prosecution have been examined in the sense that the examination, cross-examination and re-examination have concluded, the accused is entitled to the advantage of being called upon to explain any matter against him. Mr. Justice Cuming has taken the view that, upon the wording of the section, the words "after the witnesses for the prosecution have "been examined" do not mean more than that the witnesses for the prosecution have been examined-in-chief.

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RANKIN J.

To begin with, in this reference, the learned vakil for the complainant has drawn my attention to sections 255, 256 and 289 of the Code of Criminal Procedure. He has contended that the words of section 342, "and before he is called on for his "defence", mean the same thing as the expression, "he shall be asked whether he is guilty or has any "defence to make", and that they do not mean the same thing as the words in section 256 where it says that the accused "shall then be called upon to enter "upon his defence and produce his evidence." In like manner he distinguishes the language of section 342 from the concluding words of section 289 "the Court "shall call on the accused to enter on his defence." Now, it is quite true that the phrase "before he is "called on for his defence" is slightly different from the phrase "called on to enter upon his defence," but in my judgment they mean exactly the same thing, and the reference at the end of the first sub-section of section 342 is to the same point or to the same matter as is dealt with at the end of the first sub-section of section 256. Section 255 deals with plea The question is not one of calling on the accused for his defence, or of entering upon a defence, but only of ascertaining whether there is any defence or not. If there is a plea of guilty, it will not be necessary to hear further evidence for the prosecution. In most cases the stage in the case pointed out by the first sub-section of 255 will not immediately be followed by the accused person entering on his defence or being called upon for his defence, but will be followed by the prosecution proceeding to prove their case.

The next point taken is that if one looks at various sections of the Code, one will find that examination, cross-examination and re-examination are used in

contra-distinction to one another. It is, however, quite clear that examination-in-chief, cross-examination, and re-examination are different sub-species of what is called more broadly "examination." A witness is said to be "examined" when the whole process has been completed. In this connection I will refer to section 231 of the Code. It seems to me that it is quite clear that the word "examine" is there used in the larger sense, and that it would cover cross-examination. In the same way it seems to me that the frame of section 342 must be considered. A particular stage of the trial is indicated by saying "after the witnesses for the prosecution have been examined and before he is called on for his defence". Does that mean that the witnesses for the prosecution have been completely heard and finished and the evidence for the defence is about to begin, or does it mean that the witnesses for the prosecution have been part heard—have been examined-in-chief, and that at any time during the succeeding stages, but before the accused is called on to enter on his defence, the accused is to be examined by the Court. In my judgment the end of sub-section (*l*) of section 342 indicates a perfectly definite stage, namely, after the prosecution case is finished and before the defence case is begun. It is difficult in a long Code to maintain a special meaning for ordinary English words, and in section 342, just as in section 231, the word "examine" is to be taken, in my judgment, in the ordinary English sense in which it covers all kinds of examination including cross-examination and re-examination. The language of section 137 of the Indian Evidence Act shows the primary meaning of the word because it says that the examination of a witness shall in some circumstances be called examination-in-chief, in others cross-examination, and in others re-examination.

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For these reasons I am of opinion that the judgment of Mr. Justice Buckland and the order proposed by him is right, and the judgment of Mr. Justice Cuming dissenting from it ought not to be upheld. I propose in this case to make the same order as Mr. Justice Buckland proposed to make, namely, to make the Rule absolute, to set aside the order of the trial Court and direct the trial to be resumed by the Magistrate from that point at which the examination under section 342 should have taken place.

E. H. M. *Rule absolute.*

APPELLATE CIVIL.

Before Mookerjee and Rankin JJ.

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Feb. 2

RAJENDRA NARAIN CHOWDHURY

v.

SATISH CHANDRA CHOWDHURY.*

Jurisdiction of Civil Court—Partition of a definite portion representing a specified share of a revenue-paying estate in Assam—Assam Land and Revenue Regulation (I of 1886) ss. 96, 154.

Where the question for decision was whether the plaintiffs could sue in a Civil Court for a partition of a definite plot of land corresponding to a specified share of a revenue-paying estate in Assam :

Held, that a Civil Court had jurisdiction to try such a suit and effect partition and that section 154 of the Assam Land and Revenue Regulation did not operate as a bar.

Cases on the subject reviewed.

APPEAL by Rajendra Narain Chowdhury, the defendant No. 3.

* Appeal from Original Decree, No. 207 of 1920, against the decree of Kali Prasanna Sen, Subordinate Judge of Sylhet, dated June 1, 1920.