APPELLATE CRIMINAL.

Before Rankin J.

PRAMATHA NATH MUKERJEE

1923 *v.*

Jan. 25. EMPEROR.*

Accused—Omission by Presidency Magistrate to examine the accused after the cross-examination and re-examination of all the prosecution witnesses —Filing written statements—Warrant case—Effect of non-compliance with the law—Re-trial—Criminal Procedure Code (Act V of 1898), s. 342.

A Magistrate is bound to examine the accused, under s. 342 of the Criminal Procedure Code, after the examination, cross-examination and re-examination of all the prosecution witnesses. It is not a compliance with the section to examine the accused before he has the whole of the prosecution evidence in front of him, or after the close of the defence evidence.

Non-compliance with section 342 is fatal to the trial even when the accused has not been prejudiced thereby.

Mazahar Ali v. *Emperor* (1) followed.

The trial is illegal from the stage when, without compliance with the section, the Magistrate calls on the accused to enter upon his defence. Re-trial from the close of the re-examination of the prosecution witnesses ordered.

A promise by the accused to file a written statement, made at the time of the plea, in no way absolves the Court from its duty of examining the accused at a later stage as required by s. 342. The intention of the law is that at a certain stage of the case the Court itself shall call on the accused to state in his own way anything he desires to say. There is a very great difference between a written statement, presumably prepared and almost certainly revised by the defence pleader, and a statement by the accused himself.

A discussion with the accused's counsel, as to the nature and number of the defence witnesses, is not an examination under the section.

* Criminal Appeal No. 386 of 1922, and Criminal Revision No. 677 of 1922, against the order of A. Z. Khan, Third Presidency Magistrate, Calcutta, dated July 4, 1922.

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The facts of the case were as follows. On the 14th February 1922, Mr. Kidd, a Deputy Commissioner of Police, Calcutta, filed a complaint before the Chief Presidency Magistrate, under s. 500 of the Penal Code, against Pramatha Nath Mukerjee, the editor, and Ramendra Nath Bose, the printer, of the "*Servant*," a local daily paper, for defamation in its issues of the 20th and 23rd January 1922. The case was transferred to the file of A. Z. Khan, Third Presidency Magistrate, and heard by him.

The examination-in-chief of the prosecution witnesses concluded on the 14th March, on which date the Magistrate framed charges and called on the accused to plead thereto. They pleaded not guilty, and stated that they would file written statements. The cross-examination and re-examination of the above witnesses ended on the 12th April. According to the Magistrate's report he "called upon the accused to enter upon their defence, and had a discussion with the counsel for the defence as to the number and nature of the witnesses the accused were going to call." The accused were not themselves examined by him at any time.

The defence closed its case on the 16th May, and the accused filed their written statements on the 20th. They were convicted and sentenced, on the 4th July, Pramatha Nath to a fine of Rs. 500, and Ramendra to a fine of Rs. 50.

Pramatha appealed to the High Court and Ramendra obtained a Rule. The omission to examine the accused was not a ground mentioned in the appeal and revision petitions. The appeal and Rule came on before Newbould and Suhrawardy JJ. An objection was taken that the accused had not been examined, and that the trial was vitiated thereby, but there were no materials on the record to determine the point, and

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the hearing proceeded on the merits. Their Lordships differed on the question whether the defence of publication in good faith, within Exception 9 to s. 500 of the Penal Code was made out, and the case was referred to Rankin J. under s. 429 of the Criminal Procedure Code.

The objection based on the ground of non-compliance with s. 342 of the Code was repeated before Rankin J. who called for a report from the trial Magistrate; and it was duly submitted.

Babu Dasarathi Sanyal (with him *Babu Narendra Kumar Bose*, *Babu Samarendra Kumar Dutt*, *Babu Hemendra Nath Bose*, *Babu Ban Behari Sircar*, *Babu Lolit Mohan Sanyal*, *Babu Satindra Nath Roy Chowdhury* and *Babu Asita Ranjan Ghose*), for the appellant. The accused were not examined under s. 342 of the Code after the cross-examination and re-examination of the prosecution witnesses. Non-compliance with the section vitiates the trial: *Mazahar Ali* v. *King-Emperor* (1), *Kashi Pramanik* v. *Danu Pramanik* (2), *Mitarjit Singh* v. *Emperor* (3), *Emperor* v. *Fernandez* (4), *Emperor* v. *Basapa Ningapa* (5). The putting in of a written statement by the accused does not exonerate the Magistrate from complying with the law.

Mr. B. L. Mitter (with him *Babu Taraknath Sadhu*), for the Crown. There was a substantial compliance with the terms of the section. Refers to the Magistrate's report. If the Magistrate is informed, at the close of the prosecution and before his examination of the accused, that the latter intends to file a written statement, he is not bound to ask the accused

(1) (1922) I. L. R. 50 Calc. 223; 27 C. W. N. 99.
(2) (1921) 27 C. W. N. 28.
(3) (1921) 6 P. L. J. 644.
(4) (1920) I. L. R. 45 Bom. 672.
(5) (1915) 17 Bom. L. R. 892.

what he has to say. Apart from the first ruling cited, non-compliance with the mandatory provisions of the Code is only an irregularity and not an illegality unless the accused is prejudiced. In this case he was not prejudiced. If the conviction is set aside there should be a re-trial.

Babu Dasarathi Sanyal replied on the question of re-trial.

RANKIN J. In my opinion this case must be disposed of on the footing that there has not been a compliance by the Magistrate with the provisions of section 342 of the Criminal Procedure Code.

According to the order-sheet the accused were properly called upon to plead. That was on the 14th March, 1922, and at that time they stated that they pleaded not guilty and also that they would both file written statements. The duty of the Magistrate under section 342 is not in question at that stage. It arises when the witnesses for the prosecution have been examined, cross-examined and re-examined, and according to the order-sheet that process was completed on the 12th April 1922, on which date the case was adjourned until the 25th for the purpose of the accused entering on their defence. It is quite clear that the promise to file written statements, made at the time of the plea, in no way exonerates or exempts the Court from examining the accused at a later stage as required by section 342. There is no minute in the order-sheet to the effect that, on the 12th April or on the 25th April, anything purporting to be an examination of the accused took place, nor is there any indication of questions put and answers obtained upon such examination. It appears from the report made by the Magistrate that, at the close of the prosecution case, he had discussions with the

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learned counsel for the defence as to the number and nature of the witnesses the accused were going to call. It also appears from the Magistrate's report that he always understood, and so far as he now remembers he was told, that the accused would file the written statements promised by them. In these circumstances the Magistrate has said in his report: "It will thus be seen that I did examine the accused, and gave them the fullest opportunity to make their statements. And they did so in their written statements filed on the 20th May 1922, when not only had the prosecution witnesses been cross-examined and re-examined but also their own defence been finished".

Now, the first question to which I have to address myself is the question whether there has been a compliance with the section. In this country it often happens that a prisoner is tried in a language which for one reason or another he understands but indifferently well, and for that reason as well as for other equally grave reasons the intention of the statute is that at a certain stage in the case the Court itself shall put aside all counsel, all pleaders, all witnesses, all representatives, and shall call upon each individual accused with the authority of the Court's own voice to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating. In the case of an accused, who is in no difficulty in understanding the proceedings, a question addressed to his counsel in his hearing and answered by his counsel in his hearing may perhaps be taken in certain circumstances as a compliance with the section. It is not a full compliance with the section, but I say nothing whatever to create any more trouble than is absolutely necessary in any case of that character. What is necessary is that the accused shall be brought face to

face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence, if he is willing to make one with his own lips. Now, I cannot think that the fact that there was a discussion with the counsel about the number and nature of the witnesses is the same thing at all as what the section requires. It is important also to have regard to the time at which this examination took place. In the decided cases it has been pointed out that to ask an accused for his defence, before he has the whole of the prosecution evidence in front of him, is not a compliance with the section. In my opinion to ask the accused, not at the beginning of his defence, but later on, when his statements may be subject to heavy discount owing to the evidence given in his hearing by his own witnesses in the meantime,—that is not to be assumed to be a substantial compliance with the requirements of the section. In the present case I have an instance, not on the side of the accused but on the side of the complainant, of this very matter, and it is a very good illustration; because in this case much difficulty has been caused and much criticism has been made because the complainant, whose examination was not finished till after the other witnesses for the prosecution had been examined, introduced matters the value of which might have been taken quite differently if they had been introduced at the earliest possible opportunity. In like manner an accused, who is only given an opportunity to state his defence after the witnesses called by himself have been examined and cross-examined, may not be in as good a position as if he had been invited to make his defence at the proper time and before those witnesses were heard. The fact that the accused were asked to put in

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written statements, in my opinion, is of no great moment for this purpose. There is all the difference in the world between a written statement, presumably prepared, almost certainly revised, by the lawyers appearing for the defence, and a statement made by the accused himself so that the Magistrate can observe his demeanour and his manner while he makes it, and come to his conclusions as to the value of his evidence. In this country an accused is not allowed to give evidence on his own behalf, and in view of this section 342 is of cardinal importance. I say these things not because I am desirous of introducing any new technicalities or any new difficulties as regards procedure in the lower Courts. I quite appreciate that the stipendiary Magistrates in the city of Calcutta have to get through a mass of important and difficult work, and that some slips are not only natural but inevitable. At the same time the question whether a non-compliance with section 342 is fatal to the proceedings is a question as to which I am not prepared, sitting as I now am, to call into question the decision given in the case of *Mazahar Ali* v. *King-Emperor* (1). The importance of that case is that the learned Chief Justice distinctly stated this: "On the merits, as far as I can see, there is nothing to be said in support of this application, but there are the words of the section which, in my judgment, expressly provide that the Magistrate shall question the accused generally on the case at a certain stage in the proceedings". It is no doubt arguable that the words of the section are mandatory, but that it does not follow that every non-compliance is more than an irregularity. In the present case, on the facts, it is also argued with great plausibility that, if it is a proper question to entertain whether

(1) (1922) I. L. R. 50 Calc. 223; 27 C. W. N. 99.

or not these accused have suffered any prejudice, the answer should be in the negative. It seems to me highly undesirable that the ruling in the case of *Mazahar Ali* v. *King-Emperor* (1) should be whittled down by a Court which is not entitled to overrule it; and I expressly reserve my opinion on the question whether that case did or did not go too far. That, however, is the measure of justice and strictness which was meted out to the accused there, and I am not going to exact a lower scale in the present case.

In Mr. B. L. Mitter's argument there was a contention that whether or not failure to comply with the section properly amounts to an irregularity or to an illegality vitiating the proceedings depends on the question of merits, that is to say on the question whether the accused person has been prejudiced or has not been prejudiced. I must point out that there are some manifest difficulties in this view. My duty, I think, is clear, namely to follow the decision of a Division Bench of this Court, and to treat this trial as having become illegal from the moment when, without compliance with section 342, the Magistrate called upon the accused to enter on their defence.

The case is, therefore, sent back to the same Magistrate to begin the proceedings anew as from the end of the re-examination of the witnesses for the prosecution, that being the point at which, in my opinion, for non-compliance with section 342, the proceedings became illegal under the authority to which I have already referred.

Mr. Sanyal must excuse me if I do not discuss certain matters which he has mentioned in arguing this part of the case, but I have to remember that anything I might say at the present moment might seriously embarrass one or other of the parties

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when the proceedings begin afresh in the lower Court.

The result, therefore, is that the convictions of the accused are set aside, and the case sent back to the same Magistrate to begin the trial afresh from the point which I have indicated. The fines if paid must be refunded.

The same order is made on the revision petition at the instance of the second accused, the printer.

E. H. M.

APPELLATE CIVIL.

Before Walmsley and B. B. Ghose JJ.

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Feb. 2.

RAMANI KANTA RAY

v.

BHIMNANDAN SINGH.*

Kabuliyat—Evidence Act (I of 1872), s. 90—Presumption—Am-mukhtar, signature by—Proof of authority to execute a document, if necessary.

Where a *kabuliyat* more than 30 years old purported to have been executed by two ladies, A & B—*ba-kalam*—C, *Am-mukhtar* :—

Held, that under s. 90 of the Evidence Act no doubt there should be a presumption that the document was executed by C, as *Am-mukhtar*, but it must be proved that the *Am-mukhtar* had authority to execute the document on behalf of the ladies.

SECOND APPEALS by Ramani Kanta Ray, the plaintiff.

The analogous appeals Nos. 1551, 1552 and 1553 of 1921 arose out of three suits for rent against the same

* Appeals from Appellate Decrees, Nos. 1551 to 1553 of 1921, against the decrees of Manmatha Nath Bose, Subordinate Judge of Rangpore, dated March 31, 1921, reversing the decree of Jatindra Nath Mukerjee, Munsif of Gaibanda, dated Dec. 3, 1919.