CRIMINAL REVISION.

Before Sanderson C. J. and Chotzner J.

MAZAHAR ALI

v.

EMPEROR.*

1922

Aug. 1.

Accused, examination of—Examination only after examination-in-chief, or after the cross-examination, of some of the prosecution witnesses—Transfer of case after charge framed and part of cross-examination heard—Omission of the trial Magistrate to examine the accused after transfer—Warrant case—Recording evidence only once and putting in copies thereof in other cases as part of the record—Criminal Procedure Code (Act V of 1898), s. 342—Procedure.

Under s. 342 of the Criminal Procedure Code it is obligatory on the Magistrate to question the accused generally on the case after the close of the prosecution case, that is, when all the prosecution witnesses have been examined-in-chief, cross-examined and re-examined, although the accused has stated that he intends to file a written statement and has done so.

The examination of the accused, after the charge and examination-in-chief of only some of the prosecution witnesses, and again after the cross-examination of only some of such witnesses, is not a compliance with the law, and the trial is vitiated, although the accused has not been thereby prejudiced on the merits.

Where a Magistrate has, after such examinations of the accused transferred the case for trial to another Magistrate, who completes the cross-examination of the remaining prosecution witnesses, it is incumbent on the latter Magistrate to examine the accused again generally on the case, and his omission to do so renders the trial bad in law.

Directions given to Criminal Courts to observe the provisions of s. 342 of the Code.

The transfer of a part heard case, after the framing of the charge and the cross-examination of some of the prosecution witnesses, to another Magistrate for disposal is undesirable. A Magistrate who undertakes a trial and hears the witnesses should, if possible, finish it himself.

The procedure of examining the prosecution witnesses once only in one of several similar cases against the same accused, and of having their depositions typed or copied and used as part of the record in each case, was condemned.

* Criminal Revision, No. 562 of 1922, against the order of J. C. Sen, Deputy Magistrate of Rungpur, dated March 4, 1922.

1922

MAZAHAR ALI v. EMPEROR.

THE petitioner was the collecting *punchayet* of Union No. 3, at Lalmonirhat, in the district of Rangpur. On the 21st August 1920 one Huli Dass lodged a complaint against him and Baniz, his *munshi*, before the Subdivisional Officer of Kurigram, of cheating by the realization of Rs. 2 as chowkidari tax which, it was alleged, was not due. On the same date two others, named Nabo Bux and Nelox, filed separate complaints, against the same accused, of cheating by the realization of the tax twice in the same year. The three cases were amalgamated and sent to an Honorary Magistrate for disposal.

The District Magistrate, however, withdrew the cases to his own file, and on the 10th April 1921, decided to try them separately proceeding *de novo* as follows. The witnesses common to the three cases were first examined-in-chief in one case only, and their depositions recorded by a typewriter in triplicate, one copy being made part of the record in each case. The other witnesses were then separately examined in each case.

After some of the prosecution witnesses had been examined-in-chief, the District Magistrate framed charges in the three cases, under ss. 420, and 420 read with s. 120B of the Penal Code, against the petitioner, and under ss. 420, and 420 read with ss. 114 and 120B, against Baniz. Some other prosecution witnesses were next examined-in-chief, and the accused were then examined generally. The remaining prosecution witnesses were then examined-in-chief. After the cross-examination and re-examination of some only of such witnesses, the District Magistrate again examined the accused who stated that they desired to submit written statements and did so subsequently. He then transferred the case, on the 19th September, before the completion of the cross-examination of

the remaining witnesses, to Mr. J. C. Sen, a Deputy Magistrate at Rangpur. The latter, after taking the cross-examination of the remaining witnesses, and the defence, disposed of the case by convicting and sentencing the accused, without having himself examined them at all. The Sessions Judge acquitted Baniz of all the charges, and the petitioner of all but one. He thereupon obtained the present Rule.

Babu Dasarathi Sanyal (with him *Babu Debendra Narain Bhuttacharjee* and *Babu Radhika Ranjan Guha*), for the petitioner. The District Magistrate has not complied with the provisions of s. 342. The examination of the accused ought to have been taken after the cross-examination and re-examination of all the prosecution witnesses: *Mitarjit Singh* v. *Emperor* (1). The Magistrate who convicted the accused should have also examined the accused. Th filing of a written statement does not absolve the Magistrate from carrying out the provisions of the law.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown. The accused were examined twice, and they have filed written statements. They have said all they desired to place before the Court, and have not been prejudiced in any way.

SANDERSON C. J. This is a Rule calling upon the District Magistrate to show cause why the conviction of the petitioner and the sentence passed upon him should not be set aside.

The learned Sessions Judge who heard the appeal commented upon the procedure which had been adopted at the trial, and said that "the three sets of cases had a checkered life," and it is impossible for this Court to view the procedure adopted at the trial

(1) (1922) 6 P. L. J. 644.

1922

MAZAHAR ALI v. EMPEROR.

SANDERSON C. J.

with approval. The matter, however, has been simplified by reason of the judgment of the lower Appellate Court, and it is not now necessary for me to deal with the question of the joint trial, or whether it was proper to take the depositions in one case, and have them copied and used in another case. Speaking generally, in my judgment, that is not a course which should be adopted in trials of criminal cases. The learned Judge in the Appeal Court acquitted one of the accused of all the charges, and he acquitted the accused, Mazahar Ali, of two of the charges against him. He upheld the conviction of Mazahar Ali in one case only; that is the case in which Huli Dass was the complainant. In that case there is now only one matter, which it is necessary for this Court to consider, viz., whether the provisions of section 342(*1*) of the Code of Criminal Procedure were complied with in the trial Court.

The first part of the proceedings was heard by the District Magistrate, and when the case was before him the witnesses for the prosecution were examined, and some of them were cross-examined.

The accused was examined twice by the District Magistrate, once before all the prosecution witnesses had been examined, and again after all the prosecution witnesses had been examined but before all the witnesses had been cross-examined.

The case was then made over to another Magistrate, Mr. J. C. Sen. Some of the witnesses for the prosecution were cross-examined before him, the accused put in a written statement of defence, and Mr. Sen finished the trial and convicted the petitioner. This in itself was, in my judgment, an undesirable proceeding. The Magistrate who undertakes the trial of a criminal case, and who also hears the witnesses give their evidence, should, if possible, finish it.

It appears that, although, as already stated, some of the prosecution witnesses were cross-examined before Mr. Sen, the accused was not examined generally on the case by Mr. Sen in accordance with the provisions of section 342(*1*) of the Code of Criminal Procedure. In my judgment, under these circumstances, the provisions of section 342(*1*) of the Code of Criminal Procedure were not complied with.

The object of the examination referred to in the section is to enable the accused to explain any circumstances appearing in the evidence against him, and the last part of that section runs as follows: The Court "shall ... question him generally on the case after "the witnesses for the prosecution have been examined "and before he is called on for his defence." 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 completed and before the accused person is called on for his defence.

In this case I have not the least doubt that the accused person was able to put before the Court everything that he wanted to say about his case. He was examined on two occasions by the District Magistrate. The accused said that he would put in a written statement, and he did put in a written statement. 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. That stage is "after the "witnesses for the prosecution have been examined "and before he is called on for the defence". That must mean after the witnesses for the prosecution have been examined, and after the cross-examination

1922

MAZAHAR ALI v. EMPEROR

SANDERSON C. J.

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 am not now considering exceptional cases where it may be necessary for the prosecution, with the sanction of the Court to recall witnesses, or to give rebutting evidence.

The above-mentioned provision in the section is mandatory, and it has not been complied with in this case.

The result is that we are compelled to make this Rule absolute.

It remains to be considered whether the case should be remitted in order that it may be retried. It appears from the learned Sessions Judge's judgment that the proceedings were started so long ago as August 1920. There were partial trials before three Magistrates, the petitioner was in jail for two weeks. Having regard to these matters, we do not consider it right that the petitioner should be again put on his trial, and the result is that the conviction and sentence will be set aside, and the bail-bond will be cancelled.

I hope that in future the Courts will observe the provisions of section 342(*1*) of the Code of Criminal Procedure. If they will do so, they will save the High Court an immense amount of time, because, in my experience, the point herein considered is frequently arising, and Rules have to be issued by reason of the fact that the trial Court has not observed the provisions of the section.

CHOTZNER J. I agree.

E. H. M. *Rule absolute.*