CRIMINAL REVISION.

Before Cuming and Gregory JJ.

GOPAL KRISHNA SAHA

v.

MATILAL SINGH.*

1926

Nov. 25.

Summons Case—Particulars of offence not stated to the Accused—Accused not asked if he had any cause to show—Omission an illegality vitiating the trial—Criminal Procedure Code (Act V of 1898) sections 242 and 537.

The statement of the particulars to the accused, and questioning him if he has any cause to show, under section 242 of the Criminal Procedure Code, is a material and inseparable part of the procedure in the trial of a summons case, and non-compliance therewith is an illegality as to the mode of trial which vitiates the conviction.

Subrahmania Ayyar v. *King Emperor* (1) followed.

The petitioners were tried before R. Ganguli, a First Class Deputy Magistrate at Barisal, and convicted and sentenced, under sections 143 and 426 of the Penal Code, to a fine of Rs. 100. The prosecution story was that, on the night of 30th *Pous* 1332, a body of 30 or 40 men, armed with *daos* and *lathis*, came upon the informant's land, and demolished his south and east *bhita ghars*. Information was given to the police against the petitioners under sections 144, 147 and 148 of the Penal Code.

On the 6th January 1926, the Magistrate summoned the petitioners under sections 143 and 426 of the

* Criminal Revision No. 763 of 1926, against the order of Rajendra Lal Sadhu, First Additional Sessions Judge of Barisal, dated July 19, 1926.

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Penal Code. The trial commenced before him, on the 16th, with the examination of the prosecution witnesses. The particulars of the offence were not stated to the accused, on their appearance, nor were they asked if they had any cause to show, as required by section 242 of the Criminal Procedure Code. No charge was framed against them. They were ultimately convicted and sentenced as stated above. On appeal the First Additional Sessions Judge of Barisal held that the case was tried under Chapter XX, but that the accused were not prejudiced by non-compliance with section 242 of the Code. The petitioners thereupon moved the High Court and obtained the present Rule.

Mr. S. K. Sen and *Babu Suresh Chandra Taluqdar*, for the petitioners.

Mr. N. Sen and *Babu Asita Ranjan Ghose*, for the opposite party.

CUMING J. The Rule which was granted by my learned brothers Rankin and Mukerji JJ. was argued before us on four grounds: (*i*) that the provisions of section 242 were not complied with: (*ii*) that no charge was drawn up and so accused was prejudiced in his defence as the case was treated as a warrant case: (*iii*) The provisions of section 360 were not complied with: and (*iv*) an order under section 522 was passed without notice to accused.

I propose to deal first of all with the first ground.

The first point to be decided is what was the procedure followed by the Magistrate. Did he treat the case as a summons case or a warrant case? This is not easy to determine. Admittedly the Magistrate did not apply the provisions of section 242, and so it may be argued he treated the case as a warrant case.

But he also drew up no formal charge, from which it might be inferred that he dealt with the case as a summons case.

An examination of the record, however, would show that the two sections under which summons was issued against the accused are summons cases, and from this I think we must hold that the case was treated as a summons case.

That being so, the provisions applicable to a summons case would apply. These will be found in Chapter XX of the Code of Criminal Procedure. Section 242, which is one of the sections contained in the Chapter, provides that "when the accused appears "or is brought before the Magistrate, the particulars of "the offence of which he is accused shall be stated to "him and he shall be asked if he has any cause to show "why he should not be convicted; but it shall not be necessary to frame a formal charge". Admittedly this was not done, and the first question to be determined is whether this omission is an illegality or merely an irregularity curable by section 537.

In the well-known case of *Subrahmania Ayyar* v. *King Emperor* (1) the Privy Council held that the disobedience to an express provision as to a mode of trial cannot be regarded as a mere irregularity. Such a disregard is obviously then an illegality.

The question then to be decided is whether the omission to state to the accused the particulars of the offence with which he is charged is an omission to comply with an express provision of the Code as to the mode of trial. It seems to me that it is. That being so, the whole trial is vitiated. The finding and sentence must, therefore, be set aside, and the accused persons be ordered to be retried.

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The order under section 522 of the Criminal Procedure Code must also be set aside. The fine, if paid, will be refunded.

GREGORY J. I agree that the omission to comply with the provisions of section 242 is more than a mere irregularity in procedure.

The first step in a summons case is to take the plea of the accused which has to be carefully recorded. The Magistrate then decides whether he will proceed under section 243 or section 244. Section 243 empowers the Magistrate to convict on an admission, while section 244 provides that if the offence is not admitted, the evidence for the prosecution shall be taken. It is apparent then, that as the plea of the accused cannot be taken unless (under the provisions of section 242) the particulars of the offence are first stated to him and he is asked why he should not be convicted, the procedure under that section, which is laid down in express terms, is a material and inseparable part of the procedure in the trial of a summons case. I agree that this Rule must be made absolute.

E. H. M

Rule absolute.