CRIMINAL REVISION.

Before Suhrawardy and Graham JJ.

OBEDAR RAHAMAN

v.

EMPEROR.*

1929.

Feb. 8.

Accused—Examination, when should be made—"Examination," meaning of—Criminal Procedure Code (Act V of 1898), s. 342.

When an accused has been examined after the witnesses for the prosecution have been examined-in-chief, cross-examined and re-examined, there is sufficient compliance with the provisions of section 342 of the Code of Criminal Procedure and no further examination of the accused is necessary, if some of the witnesses are allowed to be further cross-examined under section 257 of the Code after the accused has been called upon to enter upon his defence.

The word "examination" in section 342 of the Code of Criminal Procedure includes cross-examination and re-examination.

Mazahar Ali v. *Emperor* (1) and *Dibakanta Chatterjee* v. *Gour Gopal Mukherjee* (2) referred to.

RULE obtained by the accused, Obedar Rahaman.

The case for the prosecution *inter alia* was that at about dusk, one Aminunnessa, the wife of the complainant, Bazel Ahmed, accompanied by a small boy, Tunya, went to the District Board tank near her house. There the accused made immoral proposals to her and, she having refused to agree to it, the accused pulled her and embraced her, whereupon she cried out. Her cries attracted several persons to the spot and the accused fled. The defence of the accused was that the case was a false one engineered by certain interested persons including one Fazlar Rahman, an influential man of the locality, with whom the accused was in enmity. The accused was put upon his trial before Mr. D. Gupta, Magistrate, 1st class, Chittagong, on a charge under section 354 of the Indian Penal Code.

*Criminal Revision, No. 1076 of 1928, against the order of R. F. Lodge, Sessions Judge of Chittagong, dated Aug. 27, 1928.

(1) (1922) I. L. R. 50 Calc. 223. (2) (1923) I. L. R. 50 Calc. 939.

1929.

OBEDAR RAHAMAN v. EMPEROR.

The charge was framed on the 16th May, 1928, and six prosecution witnesses were examined. On the next day, namely, the 31st May, 1928, one prosecution witness was examined and all the prosecution witnesses were cross-examined. On that day, two petitions were moved on behalf of the accused. In the first it was stated that, as the defence was then entitled to copies of statements of witnesses before the police, the said copies might be granted to the accused, whereupon the court ordered that the required copies might be furnished to the accused on his putting in the necessary folios. The folios were put in that very day. In the second petition, the prayer was that, as the accused could not cross-examine the witnesses with regard to their statements to the police earlier, he might be allowed to do so after he obtained the copies. The Magistrate's order, as recorded in the order sheet, on that date was as follows:—

"Examined accused. Defence wants to examine six prosecution "witnesses after this. Of them, Sub-Inspector is to be resummoned. "Others to come on personal recognizance. Accused as before. "Defence will pay costs of all, but the Sub-Inspector. Defence will "bring in witnesses on next date."

On the 14th June, 1928, seven prosecution witnesses were further cross-examined and the accused was again examined. The Sub-Inspector of Police, who was absent on that day, was cross-examined on the next hearing day, when the accused was not further examined. The trial court convicted and sentenced the accused under section 354 of the Indian Penal Code. An appeal before the Sessions Judge was dismissed. The accused, therefore, obtained this Rule from the High Court.

Mr. Anilchandra Ray Chaudhuri, for the petitioner. The trial has been vitiated for non-compliance with the provisions of section 342 of the Code of Criminal Procedure. Although, apart from the question of prejudice, trial is liable to be set aside, in this case, there has been some amount of prejudice, in as much as the Sub-Inspector was the most important witness with regard to the statements made before him. The

word "examination" in the section has been interpreted to include examination-in-chief, cross-examination and re-examination. *Gulzari Lal* v. *Emperor* (1), *Mazahar Ali* v. *Emperor* (2), *Dibakanta Chatterjee* v. *Gour Gopal Mukherjee* (3), *Jummon Christian* v. *Emperor* (4).

In this respect, the Calcutta High Court has held a view different from the view taken by the Full Bench of the Madras High Court. The most important question, therefore, is whether the cross-examination was complete on the 31st May, 1928. The two petitions clearly show that it was not. The accused had a right to obtain copies of statements to the police and to cross-examine the witnesses on those statements. He could not get the copies until he had laid the foundation for the same by partially cross-examining the witnesses. *Madari Sikdar* v. *Emperor* (5). This he did on the 31st May, when he applied for those copies. He has made it clear in his petition for copies. So he had an absolute and unfettered right to cross-examine the prosecution witnesses on those statements. As such, the subsequent cross-examination was really a part of the cross-examination proper, which could not be finished on the 31st May, by circumstances beyond the control of the accused and it was not by way of any indulgence shown by the court. The witnesses were not called under section 257, Criminal Procedure Code. The order sheet does not say so and the mere fact that the accused was ordered to pay cost and he acquiesced in it did not take away his absolute right to have the witnesses called for completing their cross-examination. Moreover, the accused was not called upon to enter upon his defence. He could not be called on to do so, because the cross-examination was not complete. The order merely asks the accused to be ready with his witnesses. That is a thing completely different from calling upon the accused to enter upon his defence. Even if it were

(1) (1922) I. L. R. 49 Calc. 1075. (3) (1923) I. L. R. 50 Calc. 939.
(2) (1922) I. L. R. 50 Calc. 223. (4) (1922) I. L. R. 50 Calc. 308.
(5) (1926) I. L. R. 54 Calc. 307.

1929.

OBEDAR RAHAMAN v. EMPEROR.

so, since the court, in its discretion, allowed witnesses to be further cross-examined, the accused should have been further examined. If the principle be to afford an opportunity to the accused to explain anything that transpired in the evidence of the prosecution, that opportunity should be given whenever the prosecution witness is examined or cross-examined: *Surendra Lal Shaha* v. *Isamaddi* (1). With regard to the second point, one of the elements of section 354 of the Indian Penal Code is the assault. If the accused merely made immoral proposal to the girl, who screamed out and the accused, thereupon, ran away, he would not be guilty under section 354. So the testimony of the witnesses, who deposed to the effect that they heard the scream and saw the accused ran away, do not in law amount to a corroboration of the testimony of the girl with regard to an offence under section 354. This is exactly what the two witnesses said, on whose testimony alone the courts below relied for corroboration. So the courts were wrong in supposing that they furnished any corroboration.

No one appeared for the opposite party.

SUHRAWARDY J. This Rule has been issued upon two grounds. The first ground is that the provisions of section 342 of the Code of Criminal Procedure were not complied with and, therefore, the conviction is bad in law. The facts, in so far as they are relevant for our present purposes, are that, on the 16th May, 1928, six prosecution witnesses were examined-in-chief and the accused was also examined. The charge was, thereafter, framed under section 354 of the Indian Penal Code and the prosecution wanted to examine some witnesses. On the 31st May, 1928, the next hearing day—the prosecution examined one more witness and all the witnesses for the prosecution, eight in number, were cross-examined by the accused. Then the accused was examined, presumably under section 342 and the Magistrate's order runs thus " Defence " wants to examine six prosecution witnesses after

(1) (1924) I. L. R. 51 Calc. 933.

" this. Of them, the Sub-Inspector is to be resum-
" moned. , Others to come on personal recognizance.
" Accused as before. Defence will pay costs of all
" but the Sub-Inspector. , Defence will bring in wit-
" nesses on next date." On the next date, the 14th June, 1928, seven prosecution witnesses were cross-examined and the accused was again examined. Only one witness (the Sub-Inspector) was not in attendance, and, therefore, could not be cross-examined. He was examined on the next day of hearing, but no further examination of the accused was held. It is argued that the accused should have been examined under section 342, after the examination of the Sub-Inspector and, as he was not so examined, his conviction must be held to be illegal.

Section 342 of the Code of Criminal Procedure has been interpreted by this Court in several cases and, in my opinion, has been too liberally construed. I do not think it will be profitable to discuss it any further. Section 342 says that, for the purpose of enabling the accused to explain any circumstance 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 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 has been held in *Mazahar Ali* v. *Emperor* (1) and *Dibakanta Chatterjee* v. *Gour Gopal Mukherjee* (2), the word " examination " in that section includes cross-examination and re-examination; that is, the witnesses have been completely examined. Now, in the present case, the witnesses were completely examined on the 31st May, 1928. The order recorded by the Magistrate on that day does not expressly say so, but it shows that, after the examination of the witnesses was closed and the accused examined, he was asked to examine his witnesses or he was called upon to enter upon his defence. The accused, however, applied to the court for permission to recall some of

(1) (1922) I. L. R. 50 Calc. 223. (2) (1923) I. L. R. 50 Calc. 939.

1929.

OBEDAR RAHAMAN v. EMPEROR.

SUHRAWARDY J.

the prosecution witnesses for further cross-examination. That was apparently done under section 257 of the Code, which says that if the accused, after he has entered upon his defence, applies to the Magistrate, etc. This must be so, as the order recorded by the Magistrate on that date shows that the application to further examine some prosecution witnesses was made after the examination of the accused; and further, that the accused was ordered to pay the costs of the prosecution witnesses for their attendance. This order could only be passed under section 257. It, therefore, appears that the accused had already entered upon his defence and the stage at which he must be examined under section 342 had passed. I do not think it proper to hold that after the prosecution has closed its case by examining its witnesses in chief and submitting them to cross-examination and re-examination, the accused can well re-open the prosecution case by applying for an indulgence from the court for further cross-examination and then claim the right that he should be examined over again. In my opinion, there has been sufficient compliance with the directory provision of the section and this ground must be overruled.

The second ground upon which this Rule has been issued is that two of the witnesses, whom the trial Magistrate regarded as corroborating the complainant, did not really corroborate her. The Magistrate, in his judgment, says that these two witnesses corroborate the story given by the girl. One of the witnesses says that "the girl told him that the accused "had thrown away her pitcher and was pulling to "take her away and thereby violated her modesty." The other witness said that "she said that Obedar had "thrown her pitcher and was pulling her to take her "to the school hut." He also said that he had heard her cries and saw the accused run away from the tank. This evidence corroborates the story of the girl, at any rate under section 157 of the Evidence Act. I do not think that there is any substance in this ground.

1929.

OBEDAR RAHAMAN v. EMPEROR.

GRAHAM J.

The Rule is, accordingly, discharged.

The accused must surrender to his bail and serve out the remainder of the sentence.

GRAHAM J. I agree that the Rule should be discharged. With regard to the first point, it seems to me that the entire argument on behalf of the petitioner is one of technicality, rather than of substance. I am further of opinion that, having regard to the facts and circumstances of this particular case, there was a proper compliance with the provisions of section 342 of the Code of Criminal Procedure. As regards the second ground, on which the Rule was granted, it may be observed, in the first place, that on reference to the judgment of the appellate court it does not appear that the learned Sessions Judge has said anything about the evidence of Khalilur Rahaman and Chand Mia corroborating the story of the girl. This ground, therefore, was not correctly worded. The judgment of the trial court does, however, refer to there being such corroboration, and when the evidence of these two witnesses is referred to, it is clear that they do in fact corroborate the story told by the girl. There is, therefore, no substance in this ground.

Rule discharged.

A. C. R. C.