CRIMINAL REFERENCE.

Before S. K. Ghose and Henderson JJ.

EMPEROR

v.

AJAHAR MANDAL.*

1934

Dec. 7.

Accused, Examination of—Accused, if must be examined in the committing court—Code of Criminal Procedure (Act V of 1898), ss. 209, 342.

The omission to examine the accused in the committing court is not a disregard of an express provision of law and, therefore, not illegal. A commitment without such examination cannot be quashed for such omission.

The accused is not called upon to enter on his defence in the committing court and, as such, the stage at which the mandatory part of section 342 of the Code of Criminal Procedure comes into operation is not reached, though it may be desirable that there should be such an examination of the accused.

Dinu v. *Emperor* (1) approved.

Queen Empress v. *Pandara Tevan* (2) referred to.

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The material facts and arguments appear from the judgment.

Prabodhchandra Chatterji, amicus curiae, in support of the reference.

Anilchandra Ray Chaudhuri for the Crown.

GHOSE J. This is a Reference by the learned Sessions Judge of Nadiya, recommending that the commitment of Ajahar Mandal and others may be quashed under section 215 of the Code of Criminal Procedure. It appears that, after an enquiry in the court of the Subdivisional Magistrate, the accused were committed to the court of sessions on charges under sections 304 and 323 of the Indian Penal Code. Before the committing magistrate, the prosecution witnesses were not cross-examined, nor were any

*Criminal Reference, No. 107 of 1934, by A. M. Ahmad, Sessions Judge of Nadiya, dated June 15, 1934.

(1) (1921) 83 Ind. Cas. 895 ; 26 Cr. L.J. 191. (2) (1900) I. L. R. 23 Mad. 636.

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defence witnesses examined. The accused were also not examined under section 342 of the Criminal Procedure Code. The learned judge says that this omission to examine the accused is illegal, and, accordingly, he recommends that the commitment would be quashed.

There is no doubt that it is very desirable that there should be an examination of the accused in the court of the committing magistrate. But the point now debated is that there must be an examination of the accused under the mandatory provision of section 342 of the Criminal Procedure Code before the accused is committed to the court of sessions and that the omission to so examine the accused is illegal. It is pointed out that section 342 occurs in Chapter XXIV of the Code, which makes general provisions as to enquiries and trials. Sub-section (*1*) of section 342 may be divided into two parts. The first part is discretionary and it says that, for the purpose of enabling the accused to explain any circumstance appearing in the evidence against him, the court may put such questions to him as it considers necessary. Then there is the mandatory part, which says that the court shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and the accused is called upon for his defence. There is no doubt that this mandatory provision will apply to all enquiries and trials, provided that the stage mentioned therein is reached, namely, after the witnesses for the prosecution have been examined and before the accused is called upon for his defence. This is clear enough, but see for instance *Bechu Lal Kayastha* v. *Emperor* (1). Now the question arises whether such a stage is reached in an enquiry under the provision of Chapter XVIII. According to section 208 of the Criminal Procedure Code, the magistrate shall take all such evidence as may be produced in support of the prosecution or on behalf of the accused or as may be called for by the magistrate. Then, according to section 209, when such evidence has been

(1) (1926) I. L. R. 54 Calc. 286.

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taken and the magistrate has, if necessary, examined the accused for the purpose of enabling him to explain any circumstance appearing in the evidence against him, the matter is to proceed further. It will be seen that this latter provision corresponds to the first or discretionary part of sub-section (*1*) of section 342. It is contended that this does not mean that the second or mandatory part of section 342 is excluded from the scope of an enquiry held under Chapter XVIII. But the fact that the discretionary provision occurs in section 209 and the mandatory provision does not occur is itself an indication that, ordinarily, in an enquiry in the committing magistrate's court, the stage at which the accused is called upon for his defence is not reached. Section 210 provides for the framing of a charge, but it does not follow that the next proceeding is for the accused to enter on his defence. It is not provided that the accused shall be called upon to finish the cross-examination of the prosecution witnesses, and thus enter upon his defence such as is provided for in section 256. All that section 211 says is that the accused shall be required to give in a list of the persons whom he wishes to summon to give evidence on his trial, that is, his trial in the Court of Session. The magistrate may in his discretion examine any of these witnesses under section 212. But, at no stage in the enquiry, is the accused called upon for his defence. On the contrary, section 219 provides that, even after commitment, the magistrate may summon and examine supplementary witnesses and such examination shall, if possible, be taken in the presence of the accused. Thus, it is apparent that, in the court of the committing magistrate, the stage at which the examination of the accused is mandatory is not reached. Obviously that stage is only reached at the trial in the Court of Session. In support of the Reference, reliance has been placed on the case of *Queen-Empress* v. *Pandara Tevan*(1). That case was decided in 1900 and it seems to have overlooked the fact that the words "if necessary" in section 209

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did not occur in the Code of 1882, but were introduced for the first time in the Code of 1898, for the view that the effect of section 209 is that it is not left to the discretion of the magistrate is not borne out by the words of the section itself. Moreover, as the learned advocate for the Crown has pointed out in this case, the provisions of section 342 were apparently not considered. Our attention has been drawn to the case of *Dinu* v. *Emperor* (1), and the view taken therein meets with our approval. It stands to reason that, in a case which is triable by a sessions court, it is the latter court which tries the accused and calls upon him to enter on his defence and, therefore, it is to that court that the mandatory provision is applicable. That being so, it cannot be said that the omission to examine the accused in the committing court in this case was a disregard of an express provision of law and therefore illegal. The Reference must be rejected.

The records must be sent down as early as possible.

HENDERSON J. I agree. Mr. Chatterji made a desperate attempt to persuade us to hold that an accused person is called upon for his defence before the committing magistrate, that is to say, at a time when he has not even pleaded to the charge and when the prosecution have not examined a single witness before the only court which has power to try him. That argument not only gives the words used an unnatural meaning, but also entirely ignores the provisions of section 289.

Reference rejected.

A.C.R.C.

(1) (1921) 83 Ind. Cas. 895 ; 26 Cr. L. J. 191.