CRIMINAL REVISION.

Before Lort-Williams and Khundkar JJ.

1934

Aug. 1, 7.

ABDUL HAKIM

v.

FAZU MIYA.*

New trial—Marginal notes, if can be referred to—Code of Criminal Procedure (Act V of 1898), s. 350.

Section 350 of the Code of Criminal Procedure refers to cases heard by a magistrate sitting singly who is succeeded by another magistrate sitting singly. It contemplates cases in which the second magistrate is a person other than the first magistrate and in which the second magistrate has not had any previous opportunity of hearing the witnesses.

The section does not apply to a case which is first heard by two magistrates constituting a bench and then transferred to that one of the two magistrates who recorded the evidence, constituting a bench singly. The accused has no right to demand a new trial in such case.

Queen-Empress v. *Sri Ahobalamatam Jeer* (1) followed.

A marginal note can be referred to for an exposition of the meaning of a section, when inserted by or under the authority of the legislature.

Ram Saran Das v. *Bhagwat Prasad* (2) followed.

Balraj Kunwar v. *Jagatpal Singh* (3) and other cases distinguished.

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In this case, on the 8th August, 1933, on a complaint before the police magistrate of Alipore, the accused were summoned under section 406 of the Indian Penal Code. The case was then transferred to a bench of two honorary magistrates, Mr. B. Rahaman and Mr. B. C. Ghosh. Of them Mr. Ghosh recorded the evidence. On the 26th February, 1934, the bench was dissolved and the two magistrates were directed to sit singly, each constituting a bench.

*Criminal Revision, No. 474 of 1934, against the order of S. N. Ray, Additional District Magistrate of 24-Parganâs, dated April 19, 1934, confirming the order of B. C. Ghosh, Honorary Magistrate at Alipore, dated Mar. 16, 1934.

(1) (1898) I. L. R. 22 Mad. 47.
(2) (1928) I.L.R. 51 All. 411.
(3) (1904) I.L.R. 26 All. 393; L.R. 31 I.A. 132.

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At this time, the trial had reached the stage when a date had been fixed for arguments and it was not taken up before the dissolution of the bench on the assurance of the lawyer for the accused that the accused would not press for trial *de novo*. Thereafter, the police magistrate formally withdrew the case to his own file and re-transferred it to Mr. Ghosh's file. The accused insisted on a trial *de novo* and obtained an order re-summoning all the witnesses. The complainant moved the Sessions Judge against that order, but his application was dismissed. He then obtained the present Rule.

The arguments on the Rule appear sufficiently from the judgment.

Binayaknath Banerji for the petitioner.

Jaygopal Ghosh and *Anilkumar Das Gupta* for the opposite party.

Cur. adv. vult.

LORT-WILLIAMS J. In this case, a Rule was issued to show cause why an order made by Mr. B. C. Ghosh, Honorary Magistrate of Alipore in the district of 24-Parganâs, under section 350 of the Code of Criminal Procedure, granting a new trial, should not be set aside. The order was upheld on revision by Mr. S. N. Ray, Additional District Magistrate of Alipore.

The petitioner filed a complaint under section 406 of the Indian Penal Code before Mr. L. K. Sen, the police magistrate of Alipore, who transferred the case for disposal to the file of Messrs. B. Rahaman and B. C. Ghosh, two honorary magistrates constituting a bench. Witnesses were examined and cross-examined on both sides, and charges framed, and the trial had reached the stage when a date had been fixed for arguments, when the bench was dissolved and the magistrates were ordered to sit singly. Mr. Sen withdrew this case to his own file, and transferred it to the file of Mr. B. C. Ghosh, who had recorded the depositions.

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Thereupon, at the re-opening of the proceedings before Mr. B. C. Ghosh, the accused demanded a new trial, under the provisions of section 350 (*1*), proviso (*a*). The magistrate held that he was bound to accede to the demand, and had no discretion to refuse to re-summon and re-hear all the witnesses. At the previous trial, the pleader for the accused had stated verbally that he would not demand a new trial, otherwise it is possible that the case would have been disposed of by the bench before it was dissolved. Some of the witnesses for the complainant have left Calcutta, and are not now available. The magistrate observed that, as a result of his order, the complainant would undoubtedly suffer inconvenience, harassment and unnecessary expense, and would probably be prejudiced owing to his inability to produce some of his witnesses for re-examination. On the other hand, it seems reasonably clear that the accused could not have been prejudiced, if their demand for a new trial had been refused. Mr. B. C. Ghosh had been present throughout the whole trial, and as already stated, had actually recorded all the depositions.

Section 350 of the Code of Criminal Procedure does not in terms apply to a case like the present. It refers to cases heard by a magistrate sitting singly, who is succeeded by another magistrate sitting singly. Obviously, it contemplates cases in which the second magistrate is a person other than the first magistrate, and in which the second magistrate has not had any previous opportunity of hearing the witnesses. The reasons for the provisions contained in the section are not present in a case like the present, especially in view of the fact that Mr. B. C. Ghosh recorded all the evidence given at the hearing before the bench which consisted of himself and Mr. Rahaman. The section refers only to cases in which the whole or any part of the evidence has been recorded by the first magistrate and he is succeeded by another magistrate. Mr. Rahaman did not record any part of the evidence, the whole of it was recorded

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by Mr. Ghosh, and, so far as he is concerned, he has not been succeeded by another magistrate but by himself.

If it were permitted to refer to the marginal note to assist one to interpret the section, it is clear that such reference would confirm the interpretation which I have put upon it, because the marginal note refers only to cases in which the evidence has been recorded partly by one magistrate and partly by another.

In *Balraj Kunwar* v. *Jagatpal Singh* (1), Lord Macnaghten said :—

> It is well settled that marginal notes to the sections of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion orginated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian Statute any greater authority than the marginal notes in an English Act of Parliament.

The English rule as stated by Lord Macnaghten seems to be founded upon the assumption that the eye of Parliament has never rested on the marginal notes, which are not always to be found on the Parliament roll. *Attorney-General* v. *Great Eastern Railway Company* (2), per Baggallay L. J., *Sutton* v. *Sutton* (3), per Jessell M. R.

But marginal notes have been referred to as part of a statute in the English courts when they have been found on the Parliament roll. *King* v. *Inhabitants of Milverton* (4), In re *Venour's Settled Estates. Venour* v. *Sellon* (5).

Nowadays, they are printed on the draft bill, so it cannot be said that the eye of Parliament has never rested on them. But the disposition of the English courts is to disregard them.

It appears, however, that, in certain local and personal Acts, marginal notes may perhaps form part

(1) (1904) I.L.R. 26 All. 393 (406); L.R. 31 I. A. 132 (142-3).
(2) (1879) 11 Ch. D. 449, 461.
(3) (1882) 22 Ch.D. 511, 513.
(4) (1836) 5 Ad. & El. 841; 111 E.R. 1385.
(5) (1876) 2 Ch.D. 522, 525.

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of the Act. In re *Working Urban District Council (Basingstoke Canal) Act, 1911* (1), per Phillimore L. J. In India, it has been held that marginal notes do not restrict the application of a section, because they are not part of the enactment: *Dukhi Mullah* v. *Halway* (2). But the Judges in that case simply followed, without discussion, *Claydon* v. *Green* (3), and the other English cases to which I have referred. In *Punardeo Narain Singh* v. *Ram Sarup Roy* (4), *Emperor* v. *Alloomiya Husan* (5), *Kesava Chetty* v. *Secretary of State for India* (6) and *Natesa Mudaliar* v. *King-Emperor* (7), the Judges again followed these cases without further discussion.

In *Narayanasami Naidu* v. *Rangasami Naidu* (8), it was decided that, though the marginal notes ought not to be held to govern the clear text of a section, yet they can be taken as an indication of what the legislature meant.

The question was very fully discussed in the case of *Ram Saran Das* v. *Bhagwat Prasad* (9), and a Full Bench of the Allahabad High Court, following and adapting the *rationes decidendi* in the case of *Claydon* v. *Green* (3), held that the question whether a marginal note can be referred to for an exposition of the meaning of a section depends upon whether the note has been inserted by or under the authority of the legislature. And King J., while discussing the practice in the U. P. Legislative Council, asserted that in that Legislative Council at any rate, the marginal notes are treated as being part of the enactment, and are inserted with the assent and authority of the legislature.

With this judgment of King J. I respectfully agree and, in my opinion, Lord Macnaghten's statement was not intended to be an authoritative and final pronouncement upon this question, so far as all

(1) [1914] 1 Ch. 300, 322.
(2) (1895) I. L. R. 23 Calc. 55.
(3) (1868) L.R. 3 C. P. 511.
(4) (1898) I. L. R. 25 Calc. 858.
(5) (1903) I.L.R. 28 Bom. 129.
(6) (1918) I.L.R. 42 Mad. 451.
(7) (1926) I.L.R. 50 Mad. 733.
(8) (1926) I.L.R. 49 Mad. 716.
(9) (1928) I. L. R. 51 All. 411.

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Indian statutes are concerned. Some day, the matter will have to be more fully considered, unless Government think fit to settle the point by inserting an appropriate section in the General Clauses Act. This course would remove all uncertainty and would save much time and trouble, and I recommend it for the attention of the Government.

However, it is not necessary to have recourse to the marginal note in order to interpret section 350 of the Code of Criminal Procedure, and, in my opinion and for the reasons which I have stated, the section has no application to the facts of this case. The somewhat similar facts in the case of *Queen-Empress* v. *Sri Ahobalamatam Jeer* (1), and the remarks of Sir Arthur Collins C. J., though not precisely in point, are sufficiently pertinent to be cited in support of the view which I have formed.

The result is that the order granting a new trial must be set aside, and the magistrate is directed to proceed with the trial of the case from the point reached at the time when the bench was dissolved.

KHUNDKAR J. I agree.

Rule absolute.

A. C. R. C.

(1) (1898) I. L. R. 22 Mad. 47.