CRIMINAL REVISION.

Before Bartley and Henderson JJ.

MUNSHI

v.

MUZAFFAR.*

1938

Aug. 24.

Appeal—Appellate Court, when can direct additional evidence to be taken—Code of Criminal Procedure (Act V of 1898), s. 428.

Under s. 428 of the Code of Criminal Procedure, an appellate Court has power to direct that witnesses who had not been cross-examined before the trial Magistrate should at that stage be cross-examined by him and their evidence certified to the appellate Court who may then proceed to dispose of the case on the entire evidence.

It may be that the trial Court may commit some illegality, such as misjoinder, which renders the proceedings entirely illegal. In such a case, whatever evidence might have been recorded in the appellate Court, a retrial will be ordered ; but that is quite a different thing from saying that the appellate Court has no jurisdiction to have the evidence taken under s. 428 of the Code of Criminal Procedure. All that can be said is that the taking of the additional evidence which takes place at the preliminary stage has been a mere waste of time, but it is quite a different thing from saying that the Court, in doing so, acted without jurisdiction.

Emperor v. *Laxman Ramshet Alwe* (1) distinguished.

CRIMINAL REVISION.

The material facts of the case and the arguments in the Revision case appear sufficiently from the judgments of the Court.

Ajit Kumar Dutt and *Asru Bhusan Das Gupta* for the petitioners.

Anil Chandra Ray Chaudhuri for the Crown.

BARTLEY J. This Rule was issued upon the District Magistrate, Tippera, to show cause why the conviction of and sentences passed on the petitioners

*Criminal Revision, No. 579 of 1938, against the order of S. S. R. Hattiangadi, Sessions Judge of Tippera, dated April 7, 1938, affirming the order of S. C. Chatterji, Magistrate, First Class of Brahmanbaria, dated Jan. 7, 1938.

(1) (1929) I. L. R. 53 Bom. 578.

1938

Munshi
v.
Muzaffar.

Bartley J.

should not be set aside upon certain grounds specified in the Rule.

The brief facts of the case were as follows:—The petitioners were placed upon their trial before a Magistrate. After the examination of a certain number of prosecution witnesses, charges were framed against them on November 1, 1937, and November 27, 1937 was fixed for cross-examination of the prosecution witnesses. On November 27, the petitioners refused to cross-examine these witnesses on the ground that they wanted time to engage a senior pleader. The petitioners' prayer for time was refused and the case proceeded. On a subsequent date, the petitioners applied for the recall of the prosecution witnesses for the purpose of cross-examination. This prayer was also refused. Subsequently defence witnesses were examined and the accused were convicted.

When the case came on appeal before the learned Sessions Judge, the latter recorded an order under s. 428 of the Code of Criminal Procedure, asking the Magistrate to cross-examine the prosecution witnesses, to certify that evidence and to resubmit it to him. On receipt of the further evidence the learned Judge heard and dismissed the appeal.

The short ground on which this Rule was issued was that the Court of appeal below had no jurisdiction to direct the Magistrate to record the evidence, and then to decide the appeal. Now the plain wording of s. 428 of the Code of Criminal Procedure empowers the appellate Court, if it thinks additional evidence to be necessary, to direct the Magistrate to take such evidence, and on its receipt to dispose of the appeal. In view of that plain language it seems difficult to hold that there was any want of jurisdiction in the appellate Court, or any illegality in its procedure.

Mr. Dutt for the petitioner suggested that where the appellate Court was of opinion that the failure

to record sufficient evidence in the lower Court prejudiced the accused, s. 428 could have no application. We are unable to see the force of this suggestion. In the first place, there was no irregularity in the procedure adopted by the learned Magistrate. In the second place, if the omission to cross-examine witnesses left a gap in the evidence, the simple and legal method of dealing with the position was certainly that adopted by the learned Judge when he directed that they should be cross-examined and their evidence submitted to him.

We are, therefore, of opinion that there is no substance in the present Rule, and that it must be discharged. The petitioners, if on bail, must surrender to their bail and serve out the remainder of their sentences.

HENDERSON J. I agree. One of the points taken before the learned Judge at the hearing of the appeal was that the defence had not cross-examined certain of the prosecution witnesses. The learned Judge gave effect to this, and directed under the provisions of s. 428 of the Code of Criminal Procedure, that the Magistrate should have the witnesses cross-examined and certify the evidence to his Court. This was accordingly done. It is now contended on behalf of the petitioners that the learned Judge's order was made without jurisdiction, because s. 428 has no application to the case of a witness, who has not been cross-examined at the trial.

If we were to give effect to this contention it would lead to most startling results. We should have to hold, in the first place, that cross-examination is not evidence.

In the second place, grave injustice would sometimes be caused. It is not uncommon in this province to find a conspiracy case, the trial of which lasts for months. It might be that, in such a case, one out of hundreds of witnesses was not cross-examined. Then, if the accused in the appellate Court asked the Judge to deal with the matter under s. 428, the only reply

1938

Munshi v. *Muzaffar.*

Henderson J.

would be that such an order was without jurisdiction, and there must be a new trial causing endless harassment to the accused. Nothing would induce me to give such an interpretation to the section unless the wording of it compels me to do so. As my learned brother has pointed out the wording is perfectly plain. If the appellate Court thinks that there is nothing in the point, no order will be passed. But, if the appellate Court thinks that this evidence is necessary, then on the plain wording of the section it has power to deal with the matter under these provisions.

In support of his contention Mr. Dutt has relied on certain observations made by the learned Judges who decided the case of *Emperor* v. *Laxman Ramshet Alwe* (1). Now those remarks do not go as far as Mr. Dutt has asked us to go. They only apply to a case in which there is some illegality committed by the trying Magistrate. They would have no application to a case such as the present, in which no illegality was committed. In my opinion, that by itself makes it difficult to assent to the proposition laid down in that decision. I do not see how the appellate Court could have jurisdiction to record evidence in some cases and not in others. The jurisdiction must apply to all of them or to none of them. With great respect to the learned Judges who decided that case, I am of opinion that they did not clearly distinguish two things which are really quite distinguishable.

It may be that a Magistrate may commit some illegality, such as a misjoinder, which renders his proceedings entirely illegal. Of course in such a case, whatever evidence might have been recorded in the appellate Court, a retrial will be ordered; but that is quite a different thing from saying that the appellate Court has no jurisdiction to have the evidence taken under s. 428. An application to that effect is usually made as a preliminary before the appeal is heard on the merits. Of course if it was discovered

(1) (1929) I. L. R. 53 Bom. 578.

later on that a new trial had to be ordered on account of some illegality, the taking of the additional evidence would have been a mere waste of time. But that is quite a different thing from saying that the Court in doing so was acting without jurisdiction.

For these reasons, I agree with my learned brother that the appellate Court has jurisdiction to proceed under s. 428 in cases where the prosecution witnesses have not been cross-examined at the trial and the appellants wish for this additional evidence to be brought before the Court.

The result, accordingly, in my opinion is that this Rule must be discharged.

Rule discharged.

A. C. R. C.