

Thereon the Second-class Magistrate of Anakapalle committed the accused to the Sessions Court.

The Sessions Judge submits that when proceedings had been stayed by the Second-class Magistrate under Section 45, that Magistrate was not empowered to commit the accused to the Court of Session.

The validity of the commitment depends on two considerations, *viz.*, whether an opinion formed by a Subordinate Magistrate and an order made thereupon is liable to be set aside by the District Magistrate, and whether the Magistrate in charge of a Division acquires jurisdiction under Section 45 over cases which he is not ordinarily competent to entertain by virtue of the order of reference made by the District Magistrate to a Subordinate Magistrate in his Division.

Inasmuch as the case had been referred to the Taluk Magistrate by the Magistrate of the District, the Taluk Magistrate when he found he had no jurisdiction to try it, should have represented the matter to the Magistrate of the district and submitted it either to the Magistrate of the District, or to such other Magistrate *having jurisdiction* as the Magistrate of the District directed. It does not appear the Divisional Magistrate had jurisdiction.

The order of the Magistrate of the District directing a commitment is not warranted by law. We set it aside and direct that the case be tried by the Magistrate of the Division in which it arose if he has first-class powers; if he has not, then by the Magistrate of the District.

[329] APPELLATE CRIMINAL.

The 6th December, 1881.

PRESENT :

SIR CHARLES A. TURNER, KT., CHIEF JUSTICE, MR. JUSTICE INNES,
AND MR. JUSTICE KINDERSLEY.

The Queen against Parasurama Naikar."

Criminal Procedure Code, Sections 215, 362—Discharge without examination of all witnesses for prosecution illegal.

Section 362† of the Code of Criminal Procedure does not give a Magistrate discretion to dispense with the examination of witnesses summoned by the prosecution.

An order of discharge under Section 215 of the Code of Criminal Procedure before all the witnesses for the prosecution have been examined is illegal.

* Revision Case No. 141 of 1881 in the matter of the proceedings of F. H. Hamnett, Acting Head Assistant Magistrate of South Arcot, dated 8th October 1881.

† [Sec. 362 :—In warrant cases, the Magistrate shall ascertain from the complainant, or otherwise, the names of any persons who may be acquainted with the facts and circumstances of the case, and who are likely to give evidence for the prosecution, and shall summon such of them to give evidence before him as he thinks necessary.

The Magistrate shall also, subject to the provisions of section three hundred and fifty-nine, summon any witness and examine any evidence that may be offered in behalf of the accused person to answer or disprove the evidence against him, and may for that purpose, at his discretion, adjourn the trial from time to time. If the Magistrate refuse to summon a witness named by the accused person, he shall record his reasons for such refusal, and the accused person shall be entitled to appeal to the Court of Session against such refusal.]

UPON revising the order of the Head Assistant Magistrate of South Arcot in Calendar Case 15 of 1881, the High Court (TURNER, C.J., INNES and KINDERSLEY, JJ.) delivered the following

Judgment:—In this case the Head Assistant Magistrate has dismissed under Section 215, Criminal Procedure Code, a complaint of an offence under Section 504 of the Penal Code after examining only two of four witnesses named by the complainant. The Magistrate issued summonses to the four witnesses named, but only two having attended, the Magistrate states that he exercised the discretion given by Section 332 and refused to procure their attendance.

The order of the Head Assistant Magistrate discharging the accused under Section 215 of the Code of Criminal Procedure is illegal and must be set aside.

Section 215 of the Code of Criminal Procedure (Explanation III) clearly requires that all the witnesses named by the prosecution must be examined.

It is noteworthy that Section 195 of the Code of Criminal Procedure which relates to inquiries into cases triable by a Court of Session, contained originally in Explanation III a provision identical with that now existing in Section 215, Explanation III.

In 1874 the Legislature, by an Amending Act (Act XI of [330] 1874) deliberately altered the Explanation attached to Section 195 by inserting the qualifying words "shall not ordinarily." It appears clear, therefore, that in the case of inquiries into cases triable by a Sessions Court, the Magistrate should ordinarily examine the witnesses named for the prosecution, and that in cases triable under Chapter XVII he *must* do so.

The High Court is of opinion that the Head Assistant Magistrate was also in error in thinking that he could, at the stage at which the trial had arrived, exercise a discretion under Section 362 of the Code of Criminal Procedure. That section applies to the course that may be taken *before*, not *after*, the issue of summonses. The Head Assistant Magistrate had issued his summonses for the attendance of four witnesses, and two of these being in default, the proper course for the Magistrate was to proceed to enforce their attendance in the manner provided in Section 355 of the Code of Criminal Procedure.

The Head Assistant Magistrate will now restore the case to the file, and, after examining all the witnesses named by the complainant, will proceed to dispose of the case according to law.

NOTES.

[See also 3 Cal. 389 : 2 All. 447.]