

APPELLATE CRIMINAL.

Before Mr. Justice Kumaraswami Sastriyar.

1915.
April 15.

Re R. SOBHANADRI AND TWO OTHERS,
(PETITIONERS), ACCUSED.*

Criminal Procedure Code (Act V of 1898), sec. 256—Summons-case and warrant-case, trial of—Procedure, that of warrant-case—Warrant-case, withdrawn—Charge framed in summons-case—Right of accused to recall and cross-examine prosecution witnesses—Magistrate, refusal of, illegal—Prejudice—Onus on prosecution.

When a summons-case and a warrant-case are tried together, the procedure to be followed is that prescribed for the warrant-case.

Rajnarayan Koonwar v. Lala Tamoli Raut (1885) I.L.R., 11 Calc., 91, followed.

If the complaint in respect of the offence triable as a warrant-case is not proceeded with, but a charge be framed only in respect of the offence triable as a summons-case, the accused is entitled to recall and cross-examine the prosecution witnesses under section 256 of the Code of Criminal Procedure, as he could not have anticipated the withdrawal of the former charge and cannot be said to have been in default.

A refusal of the Magistrate to allow the accused to recall and cross-examine the prosecution witnesses is illegal and it is for the prosecution to show that the accused are not prejudiced thereby.

PETITIONS under sections 485 and 439 of the Code of Criminal Procedure (Act V of 1898) praying the High Court to revise the judgment of E. A. HARVEY, the Joint Magistrate of Bezwada, in Criminal Appeal No. 24 of 1914, preferred against the judgment of K. SUBBA RAO, the Stationary Sub-Magistrate of Bezwada, in Calendar Case No. 474 of 1913.

The material facts appear from the order.

P. Nagabhushanam for the appellants.

P. R. Grant for the Public Prosecutor for the Crown.

KUMARASWAMI SASTRIYAR, J.—The chief ground urged in appeal is that the accused were prejudiced by the refusal of the Magistrate to allow them to recall and cross-examine the prosecution witnesses.

KUMARA-
SWAMI
SASTRIYAR, J.

The accused were tried for offences under sections 504 and 352 of the Indian Penal Code and during the course of the proceedings the Magistrate dismissed the complaint under section 504 and proceeded with the charge under section 352.

* Criminal Revision Case No. 851 of 1914.

Re SOBHA-
NADRI.
KUMARA-
SWAMI
SASTRIYAR, J.

When a summons-case and a warrant-case are tried together the procedure to be followed is that prescribed for the warrant-case *Rajnarayan Koonwar v. Lala Tamoli Raut*(1). The accused would therefore have been entitled under section 256 of the Code of Criminal Procedure to recall and cross-examine the prosecution witnesses had the trial on both charges been proceeded with. They could not have anticipated that during the trial the charge under section 504 would have been dismissed and it cannot be said that they were in default.

The refusal of the Magistrate to allow the accused to recall and further cross-examine the prosecution witnesses was therefore illegal.

The next question is whether the accused were prejudiced. This is a difficult one to decide as it may be that if cross-examination had been allowed as provided for in section 256 of the Criminal Procedure Code facts may have been elicited favourable to them. The privilege conferred by that section is a substantial one, and when denied it is for the prosecution to show that there was no prejudice. Mr. Nagabhusanam says that the accused were prejudiced and having regard to the evidence and the materials before me I cannot say that he is wrong.

Two other grounds have been urged namely:--(1) that the Magistrate was wrong in having refused to issue a summons to the Zamindar of Mylavaram, and (2) that he ought to have dismissed the complaint owing to the absence of the complainant. These are matters within the discretion of the Magistrate and I do not think these form grounds for revision.

As I am of opinion that the procedure of the Magistrate in refusing permission to the accused to recall and further cross-examine the prosecution witnesses is erroneous, I set aside the conviction and sentences and order the fines if paid to be refunded. The Magistrate will try the case and dispose of it according to law. It is desirable that the same Magistrate should not try the case.

K.R.

(1) (1885) I.L.R., 11 Calc., 91.