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who owns no property is not a question that arises for determination. It may be a legitimate argument that a husband who cannot earn an income for his own maintenance on account of his being a leper should not be compelled to find means for the support of a wife who deserts him. But in view of the finding mentioned above this question does not arise and no decision need be given upon it.

In the result I agree with my learned brother in holding that the Second Appeal fails and must be dismissed with costs.

N.R.

APPELLATE CRIMINAL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

1922, September 6.

MADURA MUTHU VANNIAN AND SIX OTHERS—ACCUSED.*

Criminal Procedure Code (Act V of 1898), ss. 256, 342 and 537—Warrant cases—Examination of accused before charge framed—Omission to examine by Magistrate after further cross-examination of Prosecution witnesses—Irregularity—Illegality.

In warrant cases accused must be examined after the further cross-examination of prosecution witnesses even though he has been examined before the charge was framed Failure to so examine an accused is not a mere irregularity such as is contemplated in section 537 but an illegality which vitiates the trial.

CASE referred for the orders of the High Court under section 438 of the Code of Criminal Procedure by A. J. KING, Additional District Magistrate, Tanjore.

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* Criminal Revision Case No. 187 of 1922.

The facts are set out in the judgment.

Public Prosecutor, *J. C. Adam*, for the Crown.

OLDFIELD, J.—This reference, made by the Additional District Magistrate, Tanjore, at the instance of the accused in Calendar Case No. 365 of 1920 on the file of the Stationary Sub-Magistrate, Tanjore, raises two questions (1) whether the latter's procedure in examining the accused in this, a warrant case, only before charge was framed and not also after the prosecution witnesses had been recalled for further cross-examination under section 256 (1), Criminal Procedure Code, was correct; (2) if it was not, whether there was an illegality vitiating the trial or an irregularity, on account of which we can in the exercise of our discretion refuse to interfere in revision.

OLDFIELD, J.

The accused are not represented before us. But we have had the advantage of a very full and careful argument from the learned Public Prosecutor. The first provision relating to the examination of the accused in a warrant case is section 253, Criminal Procedure Code, which provides that he shall be discharged, "if, upon taking all the evidence referred to in section 252" that is the evidence of the prosecution witnesses "and making such examination (if any) of the accused as the Magistrate thinks necessary" he finds that no case has been made out which would warrant a consideration and section 254 directs in the contrary even the framing of a charge and section 255 the taking of the accused's plea. But, as the words "if any" and "as he thinks necessary" show the examination at the stage depends on the option of the Magistrate; and to ascertain at

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what stage an examination is obligatory, we must turn to section 342, one of the general provisions relating to inquiries and trials under which "the Court shall for the purpose aforesaid" (of enabling the accused to explain any circumstances appearing in the evidence against him) "question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." It is on this provision that accused's contention is founded, their argument being that they were entitled to be questioned, after the examination of the witnesses had been completed by their further cross-examination after charge.

It has been suggested before us that, as section 253 (1) makes no explicit reference to cross-examination before the charge and the first such reference to it occurs in section 256 (1) the stage, at which it should ordinarily take place, is after a charge has been framed. But this is unsustainable, because the wording of section 253 is identical with that of the corresponding section of the Code of 1882, in which there was no provision for further cross-examination similar to that in the present section 256; and it is unnecessary to assume that the insertion of that provision was intended to alter the meaning of a section, which was left unchanged. The better and the sufficient ground for acceptance of accused's contention is that the examination of a witness cannot be regarded as completed until the last stage at which the law authorize its continuance has been passed. This, as explained in *Mitarjit Singh* v. *Emperor*(1), is as easily reconcileable with the

(1) (1921) 63 I.C., 825.

description of the course of a witness's examination in section 137, Indian Evidence Act, as any other supplementary cross-examination, which the Court may for special cause allow.

We have however to deal with the ambiguity involved in the specification in section 256 (1) of the stage before which the further cross-examination is to take place as "before the accused is called on to enter on his defence," because that may most simply and easily be understood as equivalent to "before the framing of the charge." The use of the same words in section 289 in connexion with the essentially different procedure at a sessions trial suggests no solution of the difficulty. It is true that in sections 255 and 256 (1) the various stages, (1) the recording of the charge, (2) the taking of accused's plea, (3) the recalling of the prosecution witnesses and their further cross-examination, (4) the accused's entry on his defence, are distinctly stated in that order. But it may be doubted whether the restriction of the accused's defence to the last stage and to the taking of the evidence he adduces corresponds with any exact or consistent use of language. For, it is difficult to see how his statement of his case to the Court or the further cross-examination by him of the prosecution witnesses on his own responsibility and for his own benefit, can be regarded, as the argument of the accused before us requires, as part, not of his defence, but of the prosecution case; and that argument cannot be reconciled with the ordinary view of the framing of a charge, as a decisive stage in the case, because it amounts to a recognition (sometimes with important consequences as to the grant of bail)

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that *primâ facie* the commission of an offence has been established; and because, on a charge being framed, the proceedings are, as was held in *Sriramulu* v. *Veerasalingam*(1), transformed from an "inquiry" into a "trial" and in the words of WALLIS, J., in *Narayanaswamy Naidu* v. *Emperor*(2), "the accused is charged and called on to answer." I add that the general mufassal practice, as I gather it from recollection and such records as have come before me in this Court, is to examine the accused only once, before charge is framed and to frame the charge only after the prosecution witnesses have first been cross-examined or offered for cross-examination, although the learned Public Prosecutor assures us that it is framed in many cases in the Presidency Magistrate's Courts after the examination-in-chief of some of the prosecution witnesses.

But, although these implications of the accused's contention may entail anomaly or inconvenience, they are not grounds for disregard of the language of the Code already referred to, by which that contention is supported and which the Legislature has chosen to employ. Section 256 took its present form by an amendment originated in Select Committee, when further cross-examination after charge was allowed on the re-enactment of the Code in 1898. In the Code of 1882 the words "the accused shall, at any time whilst he is making his defence, be allowed to recall and re-cross-examine any witness for the prosecution present in the Court or its precincts" which contain the only recognition then allowed of the right of further cross-

(1) (1915) I.L.R., 38 Mad., 585. (2) (1909) I.L.R., 32 Mad., 220.

examination, indicated clearly that its exercise was a part of the defence; and it is possible that, when the amendment was drafted, its effect on the interpretation of other provisions relating to warrant case procedure was not noticed. But, whatever our opinion, as to the result, we are not at liberty to give effect to it, when the conclusion entailed by the words used is clear. I add that, whether or no an examination of the accused at the stage they now contend for will be of any particular service to them or the administration of justice, it will seldom increase the Magistrate's work or delay the trial to any appreciable extent. On the first question stated above the decision must be that the Magistrate's procedure was incorrect.

The second question is whether the trial before him was vitiated by his error or whether in dealing with the case in Revision we can exercise our discretion. On principle it is impossible to distinguish between cases of breach of the duty to examine the accused, as it has hitherto been recognized before charge framed and, as it must now be recognized, after; and, if the accused is equally entitled to an opportunity of stating his case to the Court at either of those stages, the failure to allow him to do so at either must have the same effect on the validity of the trial. The accused's right to state his case, at whatever stage the law permits him to do so, is in my opinion fundamental and cannot be regarded as a mere error, omission or irregularity such as is contemplated in section 537 (*a*). There is little authority on the point. But *Mahomed Hossain* v. *Emperor*(1), and *Mitarjit Singh* v. *Emperor*(2), already

(1) (1914) I.L.R., 41 Calc., 743. (2) (1921) 63 I.C., 825.

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cited are in accordance with this view whilst *Mir Tilawan* v. *King-Emperor*(1), is distinguishable, because there, although the accused were not examined, they filed written statements which could be treated as equivalent to their examination. Taking this view, I would set aside the accused's convictions. The District Magistrate states that the case is not of importance and that the sentences of imprisonment have been undergone. It is therefore unnecessary to order a retrial. But, as the convictions are set aside, the fines which also formed part of the sentences must, if levied, be refunded.

RAMESAM, J.

RAMESAM, J.—I agree.

K.U.L.

(1) (1922) I.L.R., 1 Patna, 13.