APPELLATE CRIMINAL.

Before Mr. Justice Jackson.

1926, September 14.

IN RE RAJU ACHARI (1ST ACCUSED), PETITIONER.*

Criminal Procedure Code (Act V of 1898) as amended by sec. 72 of Act XVIII of 1923—Accused unrepresented by legal practitioner—Required to state forthwith if he wishes to cross-examine prosecution witnesses—Magistrate recording no reason—If mere irregularity—Sec. 256, if applicable to summary trials.

Under section 256 of the Criminal Procedure Code (Act V of 1898) as amended by section 72 of Act XVIII of 1923, a magistrate must record his reasons, where he asks an accused, who is not represented by a legal practitioner, forthwith to state whether he wishes to cross-examine the prosecution witnesses, and failure to so record his reasons is not a mere irregularity curable under section 573 of the Criminal Procedure Code.

When the legislature specially amplifies a mandatory section, no rule of construction will allow the courts to treat it as directory.

Subrahmania Ayyar v. *King-Emperor*, (1902) I.L.R., 25 Mad., 61 (P.C.), followed; *Mussamat Ghasiti* v. *The Crown*, (1925) I.L.R., 6 Lah., 554, dissented from; *Phuman Singh* v. *The Crown*, (1925) All. I.R. (Lah.), 339, referred to,

Section 256 is applicable to a summary trial.

Umaji Krishnaji v. *Emperor*, (1926) 93 I.C., 159, dissented from.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, praying the High Court to revise the conviction of, and sentence passed upon the petitioner herein, on 12th March 1926 by the Court of the Honorary Presidency Magistrate, Royapettah (Egmore), in Calendar Case No. 5099 of 1926.

S. Venkataraman for the petitioner.

Crown Prosecutor for the Crown.

* Criminal Revision Case No. 305 of 1926.

JUDGMENT.

Petitioner has been convicted under sections 323 and 114, Indian Penal Code, by the Honorary Presidency Magistrate, Royapettah, and seeks to set aside the conviction because the Magistrate asked him forthwith whether he wished to cross-examine the prosecution witnesses without recording his reasons under section 256, Code of Criminal Procedure.

It was probably intended by the Code as originally framed that in warrant cases the Magistrate should examine the prosecution witnesses in chief, and, if necessary, frame a charge without the intervention of the accused. At the next hearing, the accused could engage his vakil and cross-examine the prosecution witnesses. Accused persons however considered, probably not without reason that by the time the case reached the charge if the Magistrate had only heard one side his opinion might be too firmly fixed to be shaken. They preferred therefore to cross-examine the prosecution witnesses at the outset. In such cases, a second cross-examination after the charge might often seem a waste of time, and Magistrates were disposed to call upon the accused to re-cross-examine immediately after they had framed the charge. The accused would protest that they were still entitled to the interval which would be allowed them if they had not chosen to cross-examine and when the Magistrate proved obdurate, dissension and a sense of injustice often supervened.

Therefore by section 72, Act XVIII of 1923, section 256 was amended by inserting after the words "to state" the words "at the commencement of the next hearing of the case or, if the Magistrate, for reasons to be recorded in writing, so thinks fit, forthwith."

This appears to be a very sensible solution of the difficulty. The Magistrate still controls the procedure,

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but if his ruling runs counter to the wishes of the accused he must support it by reasons. Where the accused is represented by a vakil from the outset he may generally be asked under the section if he wishes to cross-examine forthwith, for the simple reason that the accused will not be prejudiced and it is convenient to arrange a date for the subsequent attendance of the prosecution witnesses before they disperse.

If, however, he is asked forthwith, with a view to recalling the witnesses forthwith, fuller reasons will be required because it is usually convenient to the accused to have an interval in which to study the depositions already on record, and discover material for the cross-examination of the witnesses.

If an accused is not represented by a vakil, reason must be shown for not postponing the question to the next hearing by which time he can have consulted a vakil.

In the present case, the accused who was not represented by a vakil, was required forthwith to state if he wished to cross-examine, and the Magistrate recorded no reasons.

It is argued on behalf of the Crown that this is an irregularity curable under section 537, Code of Criminal Procedure. It is difficult to apply this section to the facts of a case of this nature, for when can it be said that no failure of justice has been occasioned by refusing an accused an opportunity to consult a legal adviser? Nor do I think it applicable in law.

Before it was amended, section 256 was undoubtedly mandatory. If a Magistrate omitted altogether to ask the accused if he wished to cross-examine the prosecution witnesses, it could not be said to be a mere irregularity. And when the Legislature specially amplifies a mandatory section, there is, in my opinion, no

rule of construction which will allow the Courts to treat it as directory. No doubt a contrary opinion is expressed but without argument, in *Mussammat Ghaisti* v. *The Crown*(1) and I can only say that I respectfully differ. In *Phuman Singh* v. *The Crown*(2), CAMPBELL, J., holds that a contravention of section 256 is covered by section 537; but notes the difficulty which I have mentioned above of holding as a matter of fact that accused has not been prejudiced. As regards the law in that case, I doubt if it can really be argued that because section 535, Criminal Procedure Code, validates a conviction which is attacked merely because no charge has been framed, therefore section 537 validates a trial in which section 256 has been contravened. The safest guide in these questions is the well-known ruling of the Judicial Committee. Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity, *Subramania Ayyar* v. *King-Emperor*(3).

In Bombay it has been held that section 256 is not applicable to a summary trial, *Umaji Krishnaji* v. *Emperor*(4), and again I must express my dissent. It is argued that section 262, which provides that the procedure of warrant cases shall apply to warrant cases summarily tried except where otherwise mentioned, does not make section 256 applicable to summary trials, because section 263 relieves the Magistrate of the necessity of framing a formal charge—section 256 "clearly implies that the Court has had a charge read. . . . . It is only then that the occasion arises under which the accused is required to state whether he wishes to cross-examine." But there is no such clear implication in

(1) (1925) I.L.R., 6 Lah., 554.
(2) (1925) All. I.R. (Lah.), 339.
(3) (1902) I.L.R., 25 Mad., 61 (P.C.).
(4) (1926) 93, I. C., 159.

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section 256, which makes no reference at all to a charge, and only happens to come below section 255 because in the natural order of things the indictment precedes the defence. Whether an accused is tried under Chapter XXI or Chapter XXII, and whatever form the charge may take he must be called upon to plead, and section 256 which provides for the defence is applicable to either sort of trial. MADGAVKAR, J. (93 I.C., 159) holds that in a summary trial there can be no reason for re-cross-examination, but seems to overlook a case like the present case where the accused is put on his defence before he is represented by a vakil.

The petition is allowed and petitioner ordered to be retried by the Chief Presidency Magistrate, or any Magistrate having jurisdiction to whom he transfers the same.

The conviction and sentence are set aside and the fine if paid is to be refunded.

B.C.S.