

REVISIONAL CRIMINAL.

Before Mr. Justice Ashworth.

EMPEROR v. SUDAMAN AND OTHERS.*

1927

January, 23-

*Criminal Procedure Code, sections 435, 438 and 439—**Revision—Sessions Judge making a reference on the merits—Criminal Procedure Code, sections 253 and 342—Examination of accused—Accused examined at wrong stage of trial—Irregularity.*

A Sessions Judge sitting in revision should not make a reference to the High Court if his only objection to the finding of the court below is based on the merits, unless it is very clear that the conviction is wrong and there can be no reasonable doubt of the matter.

Where a magistrate examines an accused at a wrong stage in the trial, this is not an illegality which will necessarily vitiate his proceedings, but it will only affect them if the fact that the examination of the accused was taken at the wrong time has occasioned a failure of justice.

Mitarjit Singh v. King-Emperor (1) and *Varisai Rowther v. King-Emperor* (2), referred to.

THIS was a reference made by the Sessions Judge of Ghazipur. The facts of the case sufficiently appear from the judgement of the Court.

Munshi *Ram Nama Prasad*, for the applicant
The opposite party was not represented.

ASHWORTH, J. :—This case has been reported by the Sessions Judge of Ghazipur under section 438 of the Code of Criminal Procedure on the ground that the proceedings of the Magistrate in convicting the accused were illegal by reason of non-compliance with section 342 of the Code of Criminal Procedure. The Sessions Judge has further expressed the opinion that he was not justified in interfering with the Magistrate's finding of fact, but that, if he had been so justified, there were reasons for holding that the conviction was improper. The illegality in procedure

* Criminal Reference No. 526 of 1926.

(1) (1921) 6 Pat. L. J., 644. (2) (1922) I.L.R., 46 Mad., 449.

1927

EMPEROR
F.
SODAMAN.

complained of is this. The case was a warrant case. The law permits the court, after the examination-in-chief of the prosecution witnesses or some of the prosecution witnesses, to examine the accused. The examination of the accused at this stage is obviously, from the context, an examination intended to enable the court to decide whether it should frame a charge (section 253 of the Code of Criminal Procedure). There may be cases where the Magistrate sees an easy answer to the prosecution evidence and desires that answer to be given by the accused before he discharges the accused. If the Magistrate frames a charge the accused is then given an opportunity of cross-examining the prosecution witnesses that have been heard. The remaining witnesses, if any, for the prosecution are then examined and cross-examined and last of all the accused shall be called upon to enter upon his defence and produce his evidence (section 256 of the Code of Criminal Procedure). Section 342 adds something further to section 256. It requires the court to question the accused generally on the case just before the accused is called upon to enter upon his defence. In this case the Sessions Judge states that the Magistrate questioned the accused under section 342 not just before he was called on for his defence but at the stage when the accused should have been questioned merely with a view to enable the Magistrate to decide if it was necessary to frame a charge. The Sessions Judge, relying on the case of *Mitarjit Singh v. King-Emperor* (1), has held that this defective procedure was prejudicial to the accused because the prosecution witnesses were warned before their cross-examination of the weak points in the prosecution evidence. He has also followed this ruling in holding that the

(1) (1921) 6 Pat. L. J., 644.

defect was an illegality which could not be excused under section 537 of the Code of Criminal Procedure. On the other hand, the Magistrate has cited a decision in *Varisai Rowther v. King-Emperor* (1) as taking a different view to that held by the Patna High Court. In this decision a Full Bench, with one dissentient, held that if the accused is examined as permitted by section 253 he need not be examined again after the cross-examination and re-examination of the witnesses already heard, unless new witnesses are heard after the examination under section 253. Even in this case it was held that any irregularity could be excused under section 537 of the Code of Criminal Procedure.

1927.

EMPEROR
C.
SUDAMA.

It appears to me that the intention of the law is that the accused should be examined just before he enters on his defence and produces his witnesses, i.e., after all the prosecution witnesses have been completely done with.

At the same time it seems to me clear that any irregularity in this direction will come within the purview of section 537 and will only call for interference, if it has occasioned a failure of justice. In the present case there is no ground for holding that there was any failure of justice occasioned by reason of this irregularity.

I should, therefore, reject the reference of the Judge so far as it asks me to interfere on the ground of irregularity of proceedings by the Magistrate.

The Sessions Judge has stated that he is justified in interfering with a conviction on the merits. This does not appear to me correct. Under section 435 he may examine the record of an inferior criminal court for the purpose of satisfying himself as to the propriety of any finding and, if satisfied that any finding is improper, may report it to this Court.

1927

EMPEROR
v.
SUDAMAN.

The power of this Court to interfere on the merits is undoubted, but this Court will not exercise its power so as virtually to give a right of appeal, and in reporting a case under section 435 the Sessions Judge must bear in mind this limitation which exists in practice as regards the exercise of the High Court's power of revision under section 439 of the Code of Criminal Procedure. A case should not be reported on the ground that a conviction is bad on the merits, unless it is very clear that the conviction is wrong and that there can be no reasonable doubt of the matter.

In the present case the Sessions Judge has impugned the conviction by the Magistrate on three grounds. The first ground is that prosecution witnesses had something in common with the complainant and had some reason to be on bad terms with the accused. Another ground is that the presence of the witnesses on the spot in time to see the accused causing damage to the crops (mischief being the offence charged) was not explained sufficiently. A third reason was that the evidence of a commissioner who saw the crops a month after the event was insufficient for the purpose of holding that that damage had been caused by the accused.

I consider that the reasons given by the Sessions Judge for doubting the propriety of the conviction are not such as to justify interference by this Court in revision. To interfere on these grounds would, in my opinion, be undistinguishable from allowing an appeal.

Accordingly I direct that the record be returned.