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legislature in framing section 446, I am satisfied that the effect of that section is to debar a Magistrate from cancelling a charge which has once been framed against a person who has claimed to be tried under the provisions of chapter XXXIII as a European British subject, and whose claim to be so tried has been upheld by a competent court under section 443 of the Code. I accept this reference, set aside the order of discharge made by the Magistrate and direct that the Magistrate or his successor in office shall commit this case to the sessions.

Before Mr. Justice King.

EMPEROR v. RAM GHULAM\*

1931  
March, 8.

*Criminal Procedure Code, sections 231, 347—Alteration of charge—Right to recall witnesses—Original charge triable by Magistrate—Charge altered by Magistrate on conclusion of trial and accused committed to sessions—No opportunity given to accused for further cross-examination or for production of further witnesses—Legality of procedure.*

A Magistrate tried a case started on a complaint under section 363 of the Indian Penal Code. A charge was framed under that section. After the witnesses for the prosecution as well as for the defence had been examined and cross-examined and the case was closed, the Magistrate was of opinion that a *prima facie* case under section 366 of the Indian Penal Code was made out; and acting under section 347 of the Criminal Procedure Code, he framed a charge under section 366 and committed the case to the sessions.

*Held* that there was no illegality in the procedure adopted. Under section 347 of the Code of Criminal Procedure the Magistrate could commit the accused "under the provisions hereinbefore contained", i.e., as if acting under the provisions contained in chapter XVIII.

Section 231 did not apply to the facts of this case. It only applied to the alteration of a charge after the commencement of a *trial*; but all the proceedings in the Magistrate's court must be held to be proceedings in an *inquiry* under chapter XVIII and not proceedings in a *trial*, as soon

\*Criminal Reference No. 143 of 1931.

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as the Magistrate decided under section 347 to commit the accused for trial in the court of sessions. The Magistrate, therefore, was not required by law to give the accused the right of further cross-examination of the prosecution witnesses or of producing further defence witnesses, when the charge was altered. The accused was not deprived of any right which he might have exercised under chapter XVIII if the case had been treated as an inquiry under that chapter from the outset.

The parties were not represented.

KING, J. :—This is a reference for quashing an order of commitment under section 215 of the Code of Criminal Procedure.

The case started on a complaint of an offence under section 363 of the Indian Penal Code. The prosecution witnesses were examined and cross-examined. A charge was framed under section 363. All the defence witnesses whom the accused wished to produce were also examined and cross-examined, and the case was closed. When the case was put up for passing orders next day, the Magistrate came to the conclusion that the evidence disclosed a *prima facie* case under section 366 of the Indian Penal Code, which is exclusively triable by the court of session. Acting under section 347 of the Code of Criminal Procedure the Magistrate framed a charge under section 366 and passed the commitment order which is the subject matter of this reference.

The accused made an application complaining that he had been deprived of his right of further cross-examination of the prosecution witnesses and his right of producing further defence witnesses to disprove the amended charge. The learned Additional Sessions Judge held that the application was well founded and that the accused must be given an opportunity of further cross-examination and of producing further defence evidence before he could be committed for trial.

I do not think there is any illegality in the procedure adopted. Under section 347 of the Code of Criminal Procedure the Magistrate could commit the accused

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“under the provisions hereinbefore contained”, i.e. the provisions contained in chapter XVIII. He need not start proceedings *de novo*, but he must not deprive the accused of any right which he might have exercised under chapter XVIII if the case had been treated as an inquiry under that chapter from the outset.

But I cannot find that the accused has been deprived of any right which he might have exercised under chapter XVIII. He has cross-examined all the prosecution witnesses. He has produced all the defence evidence that he wanted to produce. He had no further right of cross-examination after the framing of a charge under section 210 of the Code of Criminal Procedure, and the amended charge must be deemed to have been framed under section 210. He had no right to produce further defence witnesses in the Magistrate's court, although if he had named any further defence witnesses the Magistrate might, under section 212, have thought fit to summon and examine them. As a matter of fact the accused did not name any fresh defence witnesses, but asked that the witnesses already examined should be summoned to give evidence on his trial.

The Additional Sessions Judge relies upon the ruling in *Mohan Lal v. Emperor* (1) which certainly does support his view. The facts of that case were very similar and a single Judge took the view that section 231 of the Code of Criminal Procedure was applicable and the accused must, after the amendment of the charge, be allowed to recall prosecution witnesses for further cross-examination and to produce further defence evidence. With due respect to the learned Judge, I do not think section 231 applies to the facts of this case. It only applies to the alteration of a charge after the commencement of the *trial*. But all the proceedings in the Magistrate's court must be held to be proceedings in an *inquiry* under chapter XVIII, and not proceedings in a

(1) (1924) 22 A.L.J., 239.

*trial*, as soon as the Magistrate decides under section 347 to commit the accused for trial in the court of session. The accused has exercised every right he could have exercised in an inquiry under chapter XVIII. He will be tried in the court of session where he will have the opportunity of cross-examining all the prosecution witnesses over again. All his defence witnesses will also be examined over again. If he now wishes to produce fresh defence witnesses, whose names did not occur to him when he was asked for a list under section 211(1), the Magistrate has discretion to summon such fresh witnesses.

In my opinion the procedure was not illegal or irregular and the accused has not been prejudiced in any way. I reject the reference. The order of commitment will hold good.

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### APPELLATE CIVIL.

1931  
March, 9.

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*Before Mr. Justice Pullan and Mr. Justice Niamat-Ullah.*

TULSHI PRASAD (DEFENDANT) *v.* DIP PRAKASH AND OTHERS (PLAINTIFFS) AND MIHIN LAL (DEFENDANT).\*

*Civil Procedure Code, order XXXIV, rule 6—Mortgage bond executed by mortgagor and sureties jointly—Sureties undertaking only a personal liability—Decree passed against all, but only for sale of mortgaged property—Sale proceeds insufficient—Personal decree can then be passed against the sureties.*

A simple mortgage deed was executed by a person who hypothecated his property and also by his sureties who undertook only a personal liability. A suit for sale on the mortgage was instituted against all the executants and a decree was passed for sale of the mortgaged property. The sale proceeds of the property proving insufficient, the mortgagees applied under order XXXIV, rule 6 of the Civil Procedure Code and a personal decree was passed against the executants, including the sureties. *Held*, that under order XXXIV, rule

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Second Appeal No. 1001 of 1928, from a decree of Ali Ausat, Additional District Judge of Aligarh, dated the 9th of March, 1928, modifying a decree of Tirloki Nath, Subordinate Judge of Etah, dated the 5th of December, 1927.