1930

RAI TODAR MAL v. HARDEO TIWARI.

lengthy civil proceedings take place. The remaining ground urged by the learned counsel was that there was no finding of the Magistrate under section 147(2), proviso. Irrigation from this tank is a matter which is exercisable at particular seasons and therefore the section requires that an order should not be passed unless the right had been exercised on the last season preceding the date of institution. I find that the first witness for the applicant to the Magistrate states that from all time irrigation has gone on from this tank and other witnesses give similar evidence. The Magistrate on this evidence in his order states "that water accumulates in this tank No. 410 and this water is used for irrigating a number of fields in the village". This shows that the case before the Magistrate was that the tank was used in previous seasons by the applicants and that those applicants in the present season were prevented from making a similar use of the tank for irrigation by the opposite party. I consider that there is nothing in any of these grounds of reference or revision. Accordingly I refuse the reference and uphold the order of the Magistrate.

Before Mr. Justice Bennet.

1930
August, 13

EMPEROR *v.* SUNDAR TELI.*

Criminal Procedure Code, section 260—*Summary trial—Jurisdiction—Prosecution launched not on complaint but on police report—Report to police of offence not triable summarily—Police prosecuting on lesser charge, triable summarily.*

A shopkeeper made a report to the police of theft from his shop of several things, the total value of which was above Rs. 50. He did not make any complaint to a Magistrate. The police, after investigation, discovered part of the stolen property with the accused person and prosecuted him in respect of it, which was less than Rs. 50 in value. The case was therefore tried summarily. The shopkeeper, who was

*Criminal Reference No. 552 of 1930.

1930

EMPEROR v. SUNDAR TELI

called as a witness, stated, as he had reported to the police, that the accused had removed and stolen the several things, valued at over Rs. 50. The Magistrate convicted the accused of theft in respect of property less than Rs. 50 in value. *Held* that the Magistrate had jurisdiction to try the case summarily and the trial was valid.

Where a Magistrate takes cognizance of a case, under section 190(1)(*b*) of the Criminal Procedure Code, upon a police report, the question whether the trial is to be summary or otherwise depends on the nature of the charge preferred by the police and not on what report was made in the police station. If the charge sent to the court by the police alleges an offence which is triable summarily, then the fact that the aggrieved person in his report to the police alleged an offence not so triable and when called as a witness by the prosecuting police made the same allegation does not affect the jurisdiction of the Magistrate to try the case summarily, unless the Magistrate comes to a finding that such allegation is proved.

Mr. *Saila Nath Mukerji*, for the applicant.

The Crown was not represented.

BENNET, J. :—This is a reference in revision made by the learned Additional Sessions Judge of Benares, recommending that the conviction and sentence in a summary trial of Sundar Teli before a Magistrate should be quashed, and that another Magistrate should be ordered to retry the case after framing proper charges. Probably the Additional Sessions Judge did not mean that the charges should be framed before the case was tried but that charges should be framed at the normal period after hearing the prosecution evidence. The facts in this case are that Mohammad Khan made a report in the thana to the effect that the following property had been stolen from his shop, namely six bags of salt valued at Rs. 43; one bag of *chokar* valued at Rs. 2-12-6, and money amounting to Rs. 5-8-0. The total property alleged to have been taken is therefore worth Rs. 51-4-6. If this case had been tried on a complaint made by Mohammad Khan in court, it is

1930

EMPEROR v. SUNDAR TELI

clear that it could not have been tried summarily, and the three rulings produced by the learned counsel for Sundar Teli are to this effect. These rulings are *Fanindra Nath* v. *Emperor* (1), *Chandra Mohan Das* v. *King-Emperor* (2) and *Kailash Chunder* v. *Joynuddi* (3). All these three cases deal with proceedings initiated in court on complaint, that is under section 190(1)(*a*). But in the present case the Magistrate took cognizance under section 190(1)(*b*) upon a report in writing of the facts made by a police officer. No ruling has been produced to show that in the case of a prosecution by the police the question whether the trial is to be summary or otherwise depends on the first report made in the police station. Now in the charge sent to the court by the police it was alleged that the accused Sundar Teli had stolen from Mohammad Khan two bags of salt. There was no prosecution by the police of Sundar Teli in regard to the remaining four bags of salt or the bag of *chokar* or the Rs. 5-8-0 cash. The reason why the police only prosecuted Sundar Teli for stealing two bags of salt is that on a search of the house of Sundar Teli only two bags of salt were found. Three of the remaining bags were found in the possession of a witness, who was the owner of the bags of salt. There was no evidence as to what had happened to the bag of chokar, and there was no evidence to confirm the statement that Rs. 5-8-0 in cash had been taken. Moreover it appears from the evidence that the accused Sundar Teli was not the only person who was concerned in the taking of property from the shop of Mohammad Khan. Other persons are alleged to have taken property at the same time, but Sundar Teli was the only person prosecuted, and the evidence against him put forward by the police was only as regards the finding of the two bags of salt in his house. It is true that the Magistrate in his finding held Sundar Teli liable for the

(1) (1908) I.L.R., 36 Cal., 67. (2) (1921) 27 C.W.N., 148.
(3) (1900) 5 C.W.N., 252.

theft of the six bags of salt. Apparently he did so because of the statement of the owner of the bags that the accused had taken away the three bags of salt which he gave back to the owner Lallan. No authority has been shown to me for the proposition that because Mohammad Khan, the owner of the shop, when called as a witness stated what he had stated in his first report, that is that property to the value of Rs. 51-4-6 was taken by the accused and his men, that therefore the jurisdiction of the Magistrate to try this case summarily would not exist. It was argued by the learned advocate for Sundar Teli that the statement of Mohammad Khan in evidence should be treated in a different way from the statements of other witnesses for the prosecution. But Mohammad Khan was not conducting the prosecution. He was merely a witness called by the police, who were prosecuting Sundar Teli. I do not see why the statement of Mohammad Khan should have the capacity of altering the jurisdiction of the court in a way that the statement of any other witness in court would not have. I consider that the jurisdiction of the court to try summarily in a case prosecuted by the police is derived from the nature of the charge preferred by the police. It is possible that if the Magistrate had come to the finding that property worth more than Rs. 50 had been stolen by this accused Sundar Teli, then the jurisdiction of the Magistrate to try the case summarily would have ceased, and it would have become the duty of the Magistrate to begin the trial again as an ordinary warrant case. But where the police prosecuted for theft of property not exceeding Rs. 50 and where the Magistrate convicted the accused of the theft of property not exceeding Rs. 50, then I consider that there is no defect in the jurisdiction of the Magistrate to try the case summarily. Accordingly I consider that the summary trial was not invalid on this ground.

1930

EMPEROR v. SUNDAR TELI.

The other ground advanced by the learned Additional Sessions Judge is that the evidence of the complainant and his witnesses disclosed the offence of dacoity. . . The evidence is that the accused and six or eight men came and demanded payment of a sum of Rs. 8, alleged to be due from the brother of Mohammad Khan, and threatened that if the money was not paid the house would be plundered. The accused and his companions then entered the complainant's shop and threw out the contents on the road and carried the contents away. There is nothing stated at all that Mohammad Khan was put in fear of instant death or instant hurt or instant wrongful restraint. The owner of the six sacks of salt, Lallan, was present and asked the accused not to take his sacks. It is quite possible that Mohammad Khan did not take any action in the matter, because he saw that the owner of the salt was present. It would have to be proved that Mohammad Khan was put in fear of instant death or instant hurt or instant wrongful restraint before it could be held that the offence amounted to robbery. Accordingly I consider that even a technical offence of dacoity is not made out, and that the learned Sessions Judge was wrong in considering that there was such a charge shown by the evidence. Moreover, as I have stated already, I do not consider that where the police prosecuted an accused person for an offence triable summarily and where the Magistrate convicts that accused person of an offence triable summarily, any exaggeration as to the nature of the offence should have any effect on the jurisdiction.

For these reasons I refuse this application in revision and uphold the conviction and sentence by the Magistrate.