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deceased with the wife of one of them, the provocation would be considered to be grave and sudden after an interval during which the deceased man was taken to a certain distance before being assaulted. We think that in the present case the exception No. 1 will apply, and accordingly we reduce the conviction from one under section 302 of the Indian Penal Code to one under section 304 of the Indian Penal Code. We sentence the accused to five years' rigorous imprisonment and we acquit him of the offence under section 302 of the Indian Penal Code and we allow the appeal to this extent.

REVISIONAL CRIMINAL

Before Mr. Justice Bennet

1938
July, 18

SHYAMA PADO DEB *v.* SUNDAR DAS*

Criminal Procedure Code, section 350(3)—*Case transferred after prosecution evidence heard—Nothing done in the case in the court of the second Magistrate—Case re-transferred to the original Magistrate—Not necessary for him to hear the prosecution evidence* de novo.

The fundamental idea of section 350 of the Criminal Procedure Code is that the Magistrate who passes judgment in a case should be the Magistrate who has heard the evidence, and if he has not heard all the evidence then the accused is given a right to demand the re-summoning and re-hearing of the witnesses by that Magistrate. Where, after the witnesses for the prosecution had been heard by one Magistrate, the case was transferred to a second Magistrate but nothing was done in his court and the case was re-transferred to the court of the original Magistrate, section 350(3) had no application and the accused was not entitled to ask that the witnesses for the prosecution be re-summoned and re-heard by such original Magistrate, who had already heard them, and who, therefore, did not come within the term "another Magistrate" in section 350(3).

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

The Deputy Government Advocate (Mr. *Sankar Saran*), for the Crown.

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*Criminal Reference No. 252 of 1938.

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SHYAMA PADO DEB v. SUNDAR DAS

BENNET, J.:—This is a criminal reference by Mr. K. N. Wanchoo, the Sessions Judge of Benares, recommending that the order of a second class Magistrate, Mr. Asthana, should be set aside. The facts of the case are that Shyama Pado Deb was prosecuted under section 406 of the Indian Penal Code in the court of Mr. Asthana in October, 1937, and the prosecution witnesses were examined and the statement of the accused was recorded and a charge was framed under section 406 and the cross-examination of the prosecution witnesses after the charge sheet was taken. The 10th of October, 1937, was fixed for the defence. At that stage Mr. Asthana was transferred from the district and the case was transferred to another Magistrate, Mr. Rana, for trial. No further proceedings took place in the court of Mr. Rana, and Mr. Asthana was re-posted to the district and the case was re-transferred to his file and came before him on the 24th of January, 1938, and he fixed the 4th of February, 1938, for the production of the defence. On that date the defence asked for a postponement which was granted. On the 15th of February, 1938, the accused applied to Mr. Asthana that the case should be heard *de novo* under section 350, clause (2), of the Criminal Procedure Code, as the learned Sessions Judge states. By this apparently he means under section 350(3). The sub-sections of the Code are referred to as "sub-sections" and not as "clauses" and it is only in the case of a bill that a reference is made to clauses. Mr. Asthana rejected the application. The learned Sessions Judge considers that the Magistrate is bound to grant the application and this view has been argued before me by Mr. *Saila Nath Mukerji*. The argument is that sub-section (3) of section 350 applies, which states: "When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter within

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the meaning of sub-section (1)." Now this sub-section merely states that in the case of a transfer the former Magistrate shall be deemed to cease to exercise jurisdiction and to be succeeded by the latter. Now turning to sub-section (1), it is stated: "Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate . ." Now there are two Magistrates contrasted by this sub-section. The first Magistrate has two qualifications; (1) he must have heard and recorded the whole or any part of the evidence, and (2) he must have ceased to exercise jurisdiction. The second Magistrate is contrasted with the first as "another Magistrate". I understand the word "another" to mean that the second Magistrate should differ from the first both on point (1) and point (2). Mr. Asthana differs only on point (2). In my opinion therefore Mr. Asthana cannot be considered "another Magistrate" within the meaning of section 350(1) because he does not fulfil the two points of difference for the first Magistrate. Therefore it appears to me that Mr. Asthana does not come under section 350 at all. I may also point out that the fundamental idea of section 350 is that the Magistrate who passes judgment in a case should be the Magistrate who has heard the evidence and if he has not heard all the evidence then the accused is given a right to demand re-summoning and re-hearing. In the case of Mr. Asthana, who has heard all the evidence for the prosecution, there is no power in this section for him to re-hear it even if he desired to do so. All the power given to him by the Code would be under section 540 to recall and re-examine any person already examined, that is he could further cross-examine, if he desired to do so, the witnesses for the prosecution. But he could not have their examination-in-chief taken again or their cross-examination, and of course the power under section 540 is

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entirely at the discretion of the Magistrate and the defence have no right to force him to recall these witnesses for further cross-examination if he does not desire to do so. Reference was made by learned counsel to a ruling of a learned single Judge of the Madras High Court in the case of *Sardar Khan Sahib* v. *Athaulla* (1). In this ruling the learned Judge did not at all apply his mind to the difficulty raised by the word "another" and therefore I cannot take his ruling as any authority for the interpretation of that word in section 350(1). I think that the reference is ill-advised and that the accused has no right to demand a re-hearing and accordingly I refuse this criminal reference and direct that the Magistrate shall proceed with the trial of the case.

Before Mr. Justice Bennet

EMPEROR *v.* PANCHAM RAM*

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U. P. Prevention of Adulteration Act (Local Act VI of 1912), section 6—"Written warranty", requirements of—"Sold in the same state in which he purchased"—Mode of proof.

In a prosecution under section 4 of the U. P. Prevention of Adulteration Act, in respect of selling and exposing for sale adulterated ghee, the shopkeeper relied on the fact that he himself had purchased the ghee from a wholesale firm under cash vouchers which stated that "the ghee sold by the firm was actual village ghee and the groceries were sold at a cheap rate": *Held* that the statement in the cash vouchers was a mere advertisement and did not amount to a written warranty as required by section 6(*a*) of the Act.

Held, also, that for the purpose of sub-section (*c*) of section 6 of the Act some independent evidence, like that furnished by an analysis and comparison of a sample taken from the wholesale firm which supplied the ghee to the accused, would be necessary besides the mere statement of the munib of the accused that the ghee was sold in the same state in which it was received.

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*Criminal Reference No. 357 of 1938.

(1) A.I.R. 1925 Mad. 174.