belonging to the dominant owner." It will be seen at a glance that the act of man, so far as it affects the easement being continuous or discontinuous, is something done upon the land belonging to the servient owner. So long as domestic water remains on the land belonging to the dominant owner—and it is there that the act of man comes in—the exercise of easement does not begin. It begins when it leaves the land belonging to the dominant owner and begins to flow on the servient tenement. So far as its flow on the latter is concerned, no act of man intervenes, unless it is a case in which the flow of any water is not possible without the dominant owner doing something on the land of the servient owner, for instance, opening a passage which is closed except when he desires to lead the water. It is clear to me that during the passage of water on the servient tenement, which alone amounts to the exercise of easement, no act of man is necessary. For these reasons, I am of opinion that no distinction can be made between water used for domestic purposes and rain water and that the plaintiffs have as much right to use the defendants' drain for the former as for the latter. I answer the question referred to us accordingly.

BENNET, J.:—I agree with the judgments of my learned brothers.

BY THE COURT:—The question contemplated by the reference, namely whether the right to drain sewage on to a servient tenement is a continuous easement, is answered in the affirmative.

## FULL BENCH

*Before Sir Shah Muhammad Sulaiman, Chief Justice, Mr. Justice Harries and Mr. Justice Bajpai*

EMPEROR *v.* ASGHAR AND OTHERS*

1935 *November*, 18

*Criminal Procedure Code, sections 208, 347—Commitment by Magistrate without taking all the evidence for the prosecution—Procedure illegal—Quashing of commitment.*

*Criminal Reference No. 183 of 1935

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*Held*, that a Magistrate, who under chapter XVIII of the Criminal Procedure Code is inquiring into a case triable by the court of session or High Court, and to whom, before the prosecution evidence is closed, it appears that the case is one which ought to be tried by the court of session or High Court, is not empowered under section 347 of the Criminal Procedure Code (subject to the production of defence witnesses under section 212) to commit the accused for such trial without completing the rest of the prosecution evidence, and that he is bound to record the rest of the evidence for the prosecution under section 208 of the Criminal Procedure Code and then commit.

Section 347 of the Criminal Procedure Code is controlled by the provisions contained in chapter XVIII of the Code. The section says that the Magistrate shall commit the accused "under the provisions hereinbefore contained" and the reference is to the provisions contained in chapter XVIII.

It is only fair to the accused that the whole of the prosecution evidence should be led in the Magistrate's court as directed by section 208, and unless that is done the accused will hardly be in a position to give a complete list of his witnesses, which he is required to do by section 211 of the Code. It could not have been the intention of the legislature in enacting section 347 to give power to the Magistrate to override this provision for procedure, obviously intended for the benefit of the accused, contained in chapter XVIII.

The Assistant Government Advocate (Dr. *M. Waliullah*), for the Crown.

The opposite parties were not represented.

BAJPAI, J.:—This is a reference by the learned Sessions Judge of Allahabad recommending that a certain commitment made by a Magistrate of the first class under section 302 of the Indian Penal Code may be quashed on the ground that it is bad in law. On account of the importance of the question of law involved in the case the matter has been referred to a Full Bench. The facts may be briefly stated. It appears that one Bhima met with his death on the 19th of December, 1934, and a first information report was lodged at police station Allahabad at 7.45 p.m. by Kallu, the brother of the deceased. He named three persons, Asghar, Nazir and Ghani, as the assailants of his brother. In the first

information report itself two persons Poni and Mahadeo were mentioned as eye-witnesses. The police investigated the case and named seventeen witnesses in the charge-sheet submitted to the Magistrate. The committing Magistrate recorded the evidence of only four out of these seventeen witnesses, two of them being more or less formal, namely, the Civil Surgeon who made the post-mortem examination and the sub-inspector who investigated the case. He also examined Kallu, the brother of the deceased, who made the first information report and Mahadeo Pasi who professed to be an eye-witness. Poni and several other prosecution witnesses who were named in the charge sheet were not examined. The learned Magistrate, after examining the accused under section 342 of the Criminal Procedure Code and framing the charge, committed the accused to the court of session, contenting himself with a note in the calendar of witnesses submitted by him that the remaining thirteen witnesses would be produced in the court of session. Presumably, the committing Magistrate in adopting this procedure relied upon certain observations made by this Court in the case of *Emperor* v. *Jhabwala* (1). The learned Sessions Judge was of the opinion that the procedure was illegal and that the commitment ought to be quashed.

I have got to consider whether the committing Magistrate was justified under the law in adopting the procedure which he did. There can be no doubt that the Magistrate was holding an inquiry under chapter XVIII of the Code of Criminal Procedure into a case triable by the court of session. Section 207 of the Code says: "The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a court of session or High Court, or, in the opinion of the Magistrate, ought to be tried by such court." It is clear that this section deals with two sorts of cases, (1) those triable exclusively by a court of session

(1) (1933) I.L.R., 55 All., 1040.

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or High Court and (2) those which in the opinion of the Magistrate ought to be so tried. The present case was a case which was triable exclusively by a court of session and therefore, in accordance with the provisions of section 207, it was obligatory on the Magistrate to follow the provisions of chapter XVIII; but it is obvious that he has construed the provisions of section 347 of the Criminal Procedure Code as empowering him not to follow the imperative provisions contained in sections 208 to 220. I shall consider the scope of section 347 at a later stage, but in the beginning I propose to consider in some detail the provisions of chapter XVIII. Section 208 says that "The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant, and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate; and the accused shall be at liberty to cross-examine the witnesses for the prosecution, and in such case the prosecutor may re-examine them." It is clear that the taking of all this evidence is obligatory before a committal order can be properly made. In the present case the prosecution definitely wanted the production of seventeen witnesses, and if section 208 alone were looked at, it is apparent that the Magistrate has failed to comply with the imperative rule laid down in that section.

The question, however, arises as to whether by reason of section 347 of the Code the Magistrate was not entitled to commit the accused for trial to the court of session at an earlier stage of the proceedings. Section 347 of the Code is: "If in any inquiry before a Magistrate, or in any trial before a Magistrate before signing judgment, it appears to him *at any stage of the proceedings* that the case is one which ought to be tried by the court of session or High Court, and if he is empowered to commit for trial, he shall commit the accused under the provisions hereinbefore contained."

The words "stop further proceedings and" have been omitted between "shall" and "commit" by section 91 of the Criminal Procedure Code (Amendment) Act XVIII of 1923. Under the old law there was a conflict of opinion as to the meaning of the words "stop further proceedings". In *Phanindra Nath Mitra* v. *Emperor* (1) a very restricted meaning was assigned to these words, and it was held that when a Magistrate considers that the case is one which ought to be tried by the court of session he should at once stop all proceedings and *then and there* pass an order of commitment to the sessions even though neither the witnesses for the prosecution had been cross-examined nor the defence witnesses examined. The learned Judges were of the opinion that the power of a Magistrate to make commitment under this section *was not subject* to the provisions of chapter XVIII. The Madras High Court and the Allahabad High Court even under the old law were of the opinion that the words "stop further proceedings" simply meant that the Magistrate should stop proceeding with the case *as a trial* and should commit the case to the sessions and in thus committing he should adopt the procedure laid down in chapter XVIII. It was said that these words did not enable the Magistrate to shorten the proceedings and then and there pass an order of commitment, which, without taking all such evidence as the accused was prepared to produce before the Magistrate, was held to be invalid; see the case of *Sessions Judge of Coimbatore* v. *Kangaya Mantradiyar* (2) and the case of *Emperor* v. *Muhammad Hadi* (3). I am of the opinion that in view of the present amendment which has deleted the ambiguous words "stop further proceedings" the legislature intended to bring section 347 into line with section 208, and a Magistrate is not empowered to pass an order of commitment without following the provisions contained in chapter

(1) (1908) I.L.R., 36 Cal., 48. (2) (1912) I.L.R., 36 Mad., 321.
(3) (1903) I.L.R., 26 All., 177.

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XVIII. In order to justify the action of the Magistrate in the present case the word "commit" in section 347 should be confined to the mere writing and signing of a commitment order, ignoring completely the fact that the committal is to be made "under the provisions" (the word is in the plural) "hereinbefore contained." The committing order can be made only under section 213 of the Code, a section which occurs in chapter XVIII, and it is therefore clear that when acting under section 347 the Magistrate has to do something referable to chapter XVIII, and when the legislature speaks of "provisions" it is obvious to my mind that the entire procedure laid down in chapter XVIII has got to be followed.

It may perhaps be useful if at this stage I trace the history of section 347, and I cannot do better than quote at length from the judgment of Fox, C.J., in the case of *Emperor* v. *Channing Arnold* (1):

"Section 347 is the successor to section 221 of the Criminal Procedure Code of 1872. That section was in chapter XVII which contained the provisions regarding the trial of warrant cases by Magistrates. It ran as follows: 'In any trial before a Magistrate, in which it may appear at any stage of the proceedings that from any cause the case is one which the Magistrate is not competent to try, or one which, in the opinion of such Magistrate, ought to be tried by the court of session or High Court, the Magistrate shall stop further proceedings under this chapter and shall, when he cannot or ought not to make the accused person over to an officer empowered under section 36 (i.e., a Magistrate empowered to award sentences up to seven years' imprisonment), commit the prisoner under the provisions hereinbefore contained. If such Magistrate is not empowered to commit, he shall proceed under section 45.' This last mentioned section is similar to

(1) (1912) 17 Indian Cases, 813.

section 346 of the present Code. In the general revision and re-arrangement of the Code, there was, no doubt, good reason for removing this provision from the chapter dealing with warrant cases to the chapter dealing with provisions applicable generally to all inquiries and trials before Magistrates. Possibly one reason may have been that according to some decisions in High Courts, a trial of a warrant case before a Magistrate did not begin until accused had been charged and his plea to the charge had been taken, and in order to avoid all possible question as to the applicability of provisions similar to those of section 221 of the Code of 1872 to any stage of a proceeding before a Magistrate, the legislature inserted the words 'in any inquiry' in section 347 of the Code of 1882 which is enacted in the Code of 1898."

It might be argued that section 347 was enacted with a view to shortening the proceedings before commitment, but the entire scheme of the Code seems to be against this view. I have already referred to sections 207 and 208. Section 209, clause (2) lays down that a Magistrate may discharge the accused at any stage, but under section 210 he can frame a charge only when all the evidence under section 208 has been taken and the accused has been examined. Section 210 may be compared with section 254 which says that a Magistrate can frame in writing a charge against the accused when evidence under section 252 has been taken and when examination of the accused has been made *or at any previous stage of the case.* It must, therefore, be conceded that a Magistrate inquiring into a case triable by the court of session is bound to take all the evidence that the prosecution may desire to produce, even if he was satisfied at an earlier stage that a *prima facie* case had been made out against the accused, and in refusing the witnesses that the prosecution wanted to produce in the present case the Magistrate has undoubtedly erred.

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I should not be deemed to hold that when a Magistrate proceeds to commit a case under section 347 to the court of session while conducting a trial or holding any inquiry other than one under chapter XVIII, proceedings under chapter XVIII are to be commenced *de novo*. If the Magistrate has already completed the evidence of the complainant and his witnesses, it is not necessary for him to take that evidence afresh; all that is necessary is that in respect of the remaining proceedings the provisions of chapter XVIII should be followed and he should 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. I am in complete agreement on this point with the view expressed in the case of *Empress of India* v. *Ilahi Bakhsh* (1) and the case of *Emperor* v. *Ram Ghulam* (2).

Coming once more back to section 347 it is clear that it refers both to an inquiry before a Magistrate and to a trial before a Magistrate, and in either case I am of the opinion that the provisions of chapter XVIII have got to be complied with and it is not open to a Magistrate to commit the accused for trial the moment it appears to him that the case is one which ought to be tried by the court of session. Over and above the reasons given by Fox, C.J., for removing section 347 from chapter XVII to chapter XXIV it might be mentioned that the word "inquiry" is a very comprehensive term, including, as it does, every inquiry other than a trial conducted under the Code of Criminal Procedure by a Magistrate or court. A proceeding under chapter XII is an inquiry; a proceeding under section 176 is an inquiry; and it might have been the intention of the legislature to authorize a Magistrate (otherwise empowered to commit for trial) holding any kind of inquiry to commit an accused to the court of

(1) (1880) I.L.R., 2 All., 910. (2) (1931) I.L.R., 53 All., 692.

session and therefore section 347 finds a place in "General provisions as to inquiries and trials".

There is yet another matter which requires consideration. It is said that although by reason of section 208 a committing Magistrate may not be authorized to commit an accused to the court of session without taking the entire evidence which the prosecution and the defence might want to produce, it is not necessary that the prosecution should produce before the Magistrate all the evidence which it intends to produce before the court of session when it is well known that the Magistrate is inquiring into a case triable exclusively by the court of session. Although perhaps it might be true, as was observed by PLOWDEN, J., in *Khan Muhammad* v. *Empress* (1) that "there was no provision either in the Evidence Act or in the Criminal Procedure Code which empowered, much less required, a Sessions Judge to refuse to take the evidence of a relevant witness tendered for the prosecution, merely because he had not been examined before the committing Magistrate", the intention of the legislature is clear that the accused should know the evidence on which the prosecution proposes to rely and that such evidence should be in the presence of the accused before the Magistrate inquiring into the case. Section 211 requires the accused to give a list of witnesses he wishes to be summoned to give evidence on his trial, as soon as the charge is framed against him under section 210, and there is no provision in the Code enabling the accused as a matter of right to give a further list of witnesses before the court of session, and it is difficult to see how the accused can give a complete list of his witnesses unless he has heard all the evidence against him. Section 219 provides that the Magistrate may, if he thinks fit, summon and examine supplementary witnesses even after the commitment and before the commencement of the trial, and such examination shall, if possible, be

(1) Punj. Rec. 1889 (Cr. J.) p. 1.

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taken *in the presence of the accused.* The attendance of the complainant and the prosecution witnesses before the court of session is secured by the committing Magistrate getting them to execute bonds binding them to be in attendance when called upon at the court of session under section 217 and the Magistrate summons under section 216 the witnesses included in the list given by the accused under section 211, and it therefore appears that the summoning of witnesses both for the Crown and for the defence is done in the court of the committing Magistrate, and although there may be no clear provision requiring a Sessions Judge to refuse to take the evidence of a relevant witness tendered for the prosecution the policy seems to be that these preliminaries should be settled in the court of the committing Magistrate. If the intention of the legislature had been to allow any witness produced by the prosecution for the first time before the court of session, there was no necessity for enacting section 219 and that is perhaps the strongest argument against the view that it is open to the prosecutor to withhold some witnesses from the court of the committing Magistrate.

In fairness to the accused, in fairness to the prosecution, and in fairness to the Magistrate the prosecutor should not be in a position to decide as to the sufficiency or otherwise of the evidence which should be placed before a Magistrate, for it may well be that if all the witnesses had been examined the case against the accused might break down completely and it may also be that in the absence of the evidence which the prosecution could produce but which has not been produced, the Magistrate may discharge the accused (who otherwise ought to have been committed) because he is not satisfied with the evidence produced before him. In spite of all these precautions a case may yet arise where it might be essential for the just decision of a case that a court may have the power to summon any person as a witness or examine any person in

attendance though not summoned as a witness, and it is for this reason that section 540 was enacted. I do not wish to suggest for a moment that a witness who has not been examined by the committing Magistrate can in no case be examined before the sessions court, but section 540 seems to be the only provision under which a new witness can be examined before the court of session.

I am, therefore, of the opinion that section 347 is controlled by the provisions contained in chapter XVIII. As was pointed out by Fox, C.J., at page 818 in the case of *Emperor* v. *Channing Arnold* (1) referred to above, " Perhaps the strongest reason for holding that section 347 in no way overrides and in no way dispenses with the obligation of following chapter XVIII is that in that chapter the legislature has laid down provisions for procedure before commitment some of which were obviously intended and rightly intended for the benefit of accused persons ", and it could not have been the intention of the legislature after having first enacted certain special provisions of procedure prior to a committing order for the benefit of the accused persons to say later on in the same Act in a general provision that the previous procedure need not be followed.

I, therefore, agree with the learned Sessions Judge that the committing order in the present case should be quashed and the Magistrate be directed to hold a complete inquiry in accordance with the procedure laid down by law.

My answer to the point referred to the Full Bench for determination is that a Magistrate, who under chapter XVIII of the Criminal Procedure Code is inquiring into a case triable by the court of session or High Court, and to whom, before the prosecution evidence is closed, it appears that the case is one which ought to be tried by the court of session or High Court,

(1) (1912) 17 Indian Cases, 813.

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is not empowered under section 347 of the Criminal Procedure Code (subject to the production of defence witnesses under section 212) to commit the accused for such trial without completing the rest of the prosecution evidence, and that he is bound to record the rest of the evidence for the prosecution under section 208 of the Criminal Procedure Code and then commit.

HARRIES, J.:—I entirely agree with the judgment delivered by BAJPAI, J., and have nothing to add. In my view the question referred to this Full Bench should be answered in the manner indicated by BAJPAI, J., in his judgment.

SULAIMAN, C.J.:—As I was a member of the Bench which decided *Jhabwala's* case (1), known as the Meerut conspiracy case, I should like to add a few words. In that case we were obsessed by the enormous delay of nearly $4\frac{1}{2}$ years that had taken place. The question whether the entire evidence for the prosecution must be produced before the committing Magistrate did not arise for decision in that case, nor was the point argued before us at the Bar. Our observations were no doubt in the nature of *obiter dicta* and therefore not of any binding authority. We made it clear that if a Magistrate stopped proceedings and did not take all the evidence that the prosecution wished to produce, and discharged the accused, the order would be improper, and that similarly if he did not take all the evidence offered by the accused and nevertheless committed the accused to the court of session, the order would be illegal and bound to be set aside. We emphasised that the Code could not mean that even if the Magistrate after hearing part of the evidence for the accused is satisfied that there is no case for commitment at all he should nevertheless proceed to complete the recording of the entire defence evidence. But we also certainly expressed our own view that the entire evidence for the

(1) (1933) I.L.R., 55 All., 1040.

prosecution need not be produced before the Magistrate, provided notice of all the evidence to be produced in the sessions court is given to the accused before trial, so that he may not be prejudiced, and particularly so, if there is a mass of similar evidence tending to prove the same point.

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This latter view was based on our interpretation of section 347 of the Criminal Procedure Code. We were aware that by an amendment (1923) the words "stop further proceedings" had been deleted; but we noted that the words "at any stage of the proceedings" were still retained. We felt that the last words "shall commit the accused under the provisions hereinbefore contained" could not mean that there should be an inquiry *de novo* under chapter XVIII and the entire evidence taken down afresh, but that the Magistrate should proceed from the stage which is appropriate. The word "inquiry" in section 347 is certainly wide enough to include an inquiry under chapter XVIII and therefore section 347 would *prima facie* be applicable. We felt that if the section be applicable, its provisions could not be altogether redundant and superfluous.

It must, however, be conceded that there is plenty of authority for the other interpretation that in spite of section 347 the Magistrate must proceed under the provisions of chapter XVIII to complete the entire evidence for the prosecution. In addition to the cases of this Court distinguished in *Jhabwala's* case (1), there are cases of other High Courts as well. Although on the one hand the duplication of the evidence and the double hearing in two courts may be harassing to the accused, on the other hand the rule that the entire evidence should be produced before the Magistrate is only fair to the accused. After all, if there is need to provide against an unnecessary waste of time the legislature can intervene and amend the Act. In view

(1) (1933) I.L.R., 55 All., 1040.

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of the opinions expressed previously, I now think that it would be safer to adhere to that view on the principle of *stare decisis* and not make any departure. On reconsideration, therefore, I agree that the opinion that the entire evidence for the prosecution need not be produced before the committing Magistrate should be taken as an *obiter dictum* and not followed in practice. In this case seventeen witnesses had been named in the charge-sheet, out of whom the Magistrate examined only four, two out of these four being of a formal character. Commitment on such incomplete evidence was certainly not contemplated by us.

BY THE COURT:—The answer to the question referred to us is that the Magistrate was bound to complete the rest of the prosecution evidence and allow the accused an opportunity to produce his evidence before committing him to the court of session.

## APPELLATE CRIMINAL

*Before Mr. Justice Allsop and Mr. Justice Ganga Nath*

1935

*November*, 19

EMPEROR *v.* NARAIN*

*Cantonments Act (II of 1924), section 236(1)—Whether a pimp can be convicted under this section*

There is nothing in the wording of section 236(1) of the Cantonments Act which says that the person importuning must importune to the commission of sexual immorality with himself or herself. A pimp who importunes a person to the commission of sexual immorality with some other person is also liable to be convicted under this section.

The Government Advocate (Mr. *Muhammad Ismail*), for the Crown.

Mr. *B. S. Darbari*, for the respondent.

ALLSOP and GANGA NATH, JJ.:—The respondent Narain Kachi was sentenced by a Magistrate in Agra to rigorous imprisonment for a period of one month under

*Criminal Appeal No. 617 of 1935, by the Local Government, from an order of Girish Prasad, Additional Sessions Judge of Agra, dated the 21st of May, 1935.