1933.

JADUNANDAN SINGH v. SRIMATI SAVITRI DEVI.

Judge restored. The appeal must be allowed with costs throughout.

MACPHERSON, J.—I agree.

KHAJA MOHAMED NOOR, J.—I agree.

Appeal allowed.

REVISIONAL CRIMINAL.

1933.

March, 3, 17.

Before Dhavle and Rowland, JJ.

BALDEO PRASAD

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 190(*1*) *and* 191—*Magistrate, cognizance taken by, under section* 190(*1*) (*b*) *on a police report—different offence disclosed by evidence—cognizance taken of the new offence—Magistrate, whether deemed to have taken cognizance under section* 190(*1*) (*c*)—*section* 191, *whether applies in such circumstances —principle applicable to summons cases, whether applies to warrant cases—taking of cognizance, significance of—court, power of, to frame charges as may be justified by evidence irrespective of offence or offences of which cognizance is initially taken.*

If a Magistrate takes cognizance of an offence under section 190(*1*) (*c*), Code of Criminal Procedure, 1898, his further proceedings are bad unless he informs the accused that he is entitled to have the case tried by another court. *Emperor* v. *Chedi*(1), followed.

But where the Magistrate has before him a police report disclosing one offence of which he takes cognizance, and if in the course of taking evidence a different offence is disclosed and he takes cognizance of it, he would be deemed to have taken cognizance of the latter offence, not under

* Criminal Revision no. 76 of 1933, from an order of Ramchandra Chaudhuri, Esq., Sessions Judge of Shahabad, dated the 23rd December, 1932, affirming the decision of P. K. Misra, Esq., Magistrate. First Class, Arrah, dated the 25th August, 1932.

(1) (1905) I. L. R. 28 All. 212.

clause (*c*) of section 190(*1*), but under clause (*b*), and therefore he is competent to hold the trial in respect of the new offence disclosed without first informing the accused under section 191 that he was entitled to have the case tried by another court.

Reg. v. *Dhandu Ramchandra*(1), *Jagat Chandra Mazumdar* v. *Queen-Empress*(2), *Dedar Buksh* v. *Symapadadas Malakar*(3), *Charu Chandra Das* v. *Narendra Krishna Chuckerbutty*(4) and *Abdul Rahman* v. *Emperor*(5), followed.

In summons cases, whatever may be the nature of the complaint or summons, the Magistrate who is trying the case may convict the accused of any offence triable under Chapter XX which on the facts he appears to have committed. In warrant cases, although the principle is not so explicitly stated, the legislature did not intend to lay down a principle different from that applicable to summons cases.

Per DHAVLE, J.—Taking cognizance under section 190(*1*) is a very particular, technical matter confined to the initiation of proceedings. Cognizance is taken under clauses (*a*), (*b*) and (*c*) of section 190(*1*) before the taking of any evidence.

The power of the court to frame charges, which comes into operation well after the initial requisite of taking cognizance under section 190(*1*), is governed by the general provisions contained in Chapter XIX which seem to enable the Court to frame such charges as may be justified by the evidence produced irrespective of the particular offence or offences of which cognizance may have been taken under section 190(*1*) at the initial stage.

When a Magistrate has taken cognizance of an offence upon a complaint or upon a police report, any offence that may be disclosed by the evidence may be dealt with at the trial, and section 190(*1*) (*c*) and section 191 have no application in such circumstances.

The facts of the case material to this report will appear from the judgment of Rowland, J.

(1) (1868) 5 Bom. H. C. R. 100 (Cr.).
(2) (1899) I. L. R. 26 Cal. 786.
(3) (1914) I. L. R. 41 Cal. 1013.
(4) (1900) 4 Cal. W. N. 367.
(5) (1925) 94 Ind. Cas. 717.

1933.

BALDEO PRASAD v. KING-EMPEROR.

S. N. Sahay (with him *Mahabir Prasad, D. N. Varma* and *Tarkeshwar Nath*), for the petitioner.

S. M. Gupta, for the Crown.

ROWLAND, J.—The petitioner has been convicted under section 409 of the Indian Penal Code and sentenced to one year's rigorous imprisonment and fine of Rs. 500. He was Head Clerk and Accountant in the Surajpura Wards Estate no. 2. In that capacity he drew from the Treasury, month by month, a number of small items of money on account of the provident fund of employees. It was his duty regularly to deposit these amounts in a post office savings bank account maintained in respect of the provident fund monies. In his books he showed these amounts as regularly paid in from time to time; but in fact they were not so paid in. The items aggregating Rs. 110-2-0 which are the subject of the charge, were drawn by him during the year 1930, but were deposited into the savings bank on the 13th October, 1931. The defence of accused was that he retained the money not for his personal use but to utilize in meeting necessary expenses of the estate for which there was not cash in hand in the estate; that payments on behalf of the estate had been made by him in advance of the bills drawn for such payments; that he drew a bill on 12th October, 1931, for Rs. 131-10-3, and made the deposit next day out of monies drawn by this bill, by which he re-imbursed himself for payments already made. The payees had received their money in advance. This defence was rejected by both the courts below. The petitioner complained that he had called for documents from the Collector or the estate which were withheld claiming privilege under the Evidence Act, section 124, and contended that he had been prejudiced thereby, because such documents would have substantiated his defence. In particular it was urged that the petitioner's explanation called for at the beginning of the enquiry, which led to the

proceedings, gave the same story as was offered at the trial, and the other documents would have proved it to be true. We have examined the cheque for Rs. 131-10-3 and compared it with the payees' receipts by which the items comprised in it are supported, and have found that the dates of these receipts conclusively prove this explanation to be false. The bulk of the money was not disbursed until after the bill was drawn. It is, therefore, not open to the petitioner to contend that he has been prejudiced by withholding necessary documents.

It was further contended that the conviction of the accused is bad in law, because in the first information the defalcation charged against the accused was in respect of a different sum, namely, Rs. 1,887, of which Rs. 110-2-0, for which he was convicted, is not a part. It is said that the Magistrate had before him a police report disclosing one offence, and if in the course of taking evidence, a different offence was disclosed and he took cognizance of it, he should be held to have taken cognizance of the latter offence not on police report under section 190 (*1*) (*b*) but under section 190 (*1*) (*c*) of the Code of Criminal Procedure, the result being that the Magistrate was disqualified from holding the trial in respect of the new offence disclosed unless he first informed the accused under section 191, Criminal Procedure Code, that he was entitled to have the case tried by another court. It may be conceded that if a Magistrate takes cognizance of an offence under sub-section (*1*), clause (*c*), of section 190, his further proceedings are bad unless he informs the accused that he is entitled to have the case tried by another court [*Emperor* v. *Chedi*(1)]. But it does not appear to us that cognizance was taken under section 190 (*1*) (*c*). To hold so appears contrary to the principles underlying the provisions for the trial of summons cases and warrant cases. In summons cases it is

(1) (1905) I. L. R. 28 All. 212.

1933.

BALDEO PRASAD v. KING-EMPEROR.

ROWLAND, J.

laid down by section 246 that whatever may be the nature of the complaint or summons, the Magistrate who is trying the case may convict the accused of any offence triable under this Chapter which on the facts he appears to have committed. In the Chapter dealing with warrant cases the principle is not so explicitly stated; but under section 254 a Magistrate has to frame a charge if he " is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try." Prima facie there is no reason to suppose that the legislature intended to lay down a different principle in warrant cases from that applicable to summons cases. Once the parties are before the court the Magistrate will deal with the accused for any offence disclosed by the evidence. No decision of the Patna High Court has been placed before us; but the Bombay High Court in *Reg.* v. *Dhandu Ramchandra*(1) have held in a case similar to the one before us that no separate complaint was needed and a Magistrate to whom the case was transferred could try the accused for any offence disclosed by the evidence and was not limited to the offence specified in the complaint or police report. In Calcutta, as long ago as 1899, a case was considered where a Magistrate had received a complaint of a certain offence and after taking evidence proceeded against the petitioner and others for an offence other than the offence mentioned in the complaint. The decision [*Jagat Chandra Mazumdar* v. *Queen-Empress*(2)] was that the Magistrate had taken cognizance of the offence under clause (*a*) and not clause (*c*) of sub-section (*1*) of section 190. And the same principle has been followed in other cases. The decisions are in accordance with the impression to be obtained from a plain reading of the relevant sections of the Code. The conviction of the accused was,

(1) (1868) 5 Bom. H. C. R. 100 (Cr.).
(2) (1899) I. L. R. 26 Cal. 786.

1933.

BALDEO PRASAD v. KING-EMPEROR.

therefore, in order. The sentence does not call for interference. In my opinion, therefore, the rule should be discharged.

DHAVLE, J.—I agree.

The point of law raised before us is that it was—so it is argued—under clause (*c*) of sub-section (*1*) of section 190 of the Code of Criminal Procedure that the trying Magistrate took cognizance of the offence of breach of trust of the particular sum in respect of which he has been convicted, and that as the Magistrate did not comply with section 191, the proceedings are void and the conviction illegal. A graver objection that could have been urged, but was not, is that even apart from section 191, the proceedings would, on that footing, be void under section 530(*k*) as the trying Magistrate was not empowered to take cognizance under clause (*c*) [*see* the Civil List for the quarter in question].

The point is so often taken that though it is really covered by authority, it may be useful to examine in some detail the position that results when the Magistrate who tries a case frames a charge of an offence not specified in the complaint or police report on which cognizance may have been taken under clauses (*a*) and (*b*) of section 190(*1*). Few Magistrates in this province are specially empowered to take cognizance under clause (*c*). Cognizance is usually taken by a Subdivisional Magistrate, and cases are mostly tried by subordinate Magistrates to whom they are transferred under section 192 after taking cognizance, but who are themselves not empowered to take cognizance under any of the three clauses of section 190(*1*).

If the petitioner's contention be correct, not only must his conviction be set aside but the procedure to be followed in a very large number of trials by Magistrates in this province will require consideration. Form XXVIII in Schedule V of the Code of Criminal Procedure states, in cases tried by

1933.

BALDEO PRASAD v. KING-EMPEROR.

DHAVLE, J.

Magistrates, that the charges are within their cognizance, but taking cognizance by reason of a transfer under section 192 or otherwise is quite a different matter from taking cognizance under section 190 (*1*) which is among the " Conditions requisite for initiation of Proceedings " and has to be satisfied before the Magistrate—whether it be the Magistrate who takes cognizance under section 190 (*1*) himself or some other Magistrate to whom he transfers the case under section 192—can begin to function as the trying Magistrate.

" The expression ' to take cognizance ' has not been defined in the Criminal Procedure Code, and it is difficult to ascertain at what precise stage of a case cognizance is said to be taken "—*see Ananta Ram Tewari* v. *Sheikh Altab*(1) and the different opinions expressed in the Full Bench case of *Emperor* v. *Mackay*(2). In *Emperor* v. *Sourindra Mohan Chuckerbutty*(3) Stephen and Carnduff, JJ. remarked that " taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence ". It is interesting in this connection to refer to section 480 of the Code which empowers the Court, when certain contempts are committed in its view or presence, to

" cause the offender to be detained in custody and at any time before the rising of the Court on the same day....., if it thinks fit, take cognizance of the offence and sentence the offender... ....."

The power of detention in such cases is exercised before the Court " takes cognizance of the offence " and is somewhat similar to the power of a Magistrate under section 64, when any offence is committed in his presence, within the local limits of his jurisdiction, to arrest or order the arrest of the offender. It may

(1) (1913) 17 Cal. W. N. 795.
(2) (1926) I. L. R. 53 Cal. 350, F. B.
(3) (1910) I. L. R. 37 Cal. 412.

be observed that action under section 480, including the taking of cognizance, is not confined to Criminal Courts alone, and that the power of arrest under section 64 may be exercised by a Magistrate irrespective of whether or not he is empowered to take cognizance under section 190(*1*).

Taking cognizance under section 190(*1*) is thus a very particular, technical matter confined to the initiation of proceedings. From the terms of clauses (*a*) and (*b*) of the sub-section it is clear that cognizance is taken under those clauses before the taking of any evidence; and section 191 shows that cognizance is taken under clause (*c*) also " before any evidence is taken ". Even apart from the wording of sections 190(*1*) and 191, the procedure laid down in the Code leaves no room for taking cognizance under section 190(*1*) after what is described in the heading of Chapter XVII as " the Commencement of Proceedings before Magistrates ". These proceedings may be inquiries under Chapter XVIII (sessions cases), or trials under Chapter XX (summons cases), Chapter XXI (warrant cases) or Chapter XXII (summary trials which, however, do not require any further notice).

In summons cases it is not necessary to frame any charges, but under section 246 the Magistrate may convict the accused of any offence triable under the Chapter which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons. No question can thus arise in summons cases regarding the applicability of section 190(*1*) (*c*) and section 191.

In warrant cases section 254 requires the trying Magistrate to frame a charge when he is of opinion that there is ground for presuming that the accused has committed an offence triable under the Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him;

1933

BALDEO PRASAD v. KING-EMPEROR.

DHAVLE, J.

and there is no direct provision similar in terms to section 246. It is in those cases that the question is often raised whether sections 190(*1*) (*c*) and 191 do not apply when the trying Magistrate frames charges relating to offences other than those specified in the complaint or police report upon which cognizance is initially taken under section 190(*1*).

As regards inquiries into sessions cases, section 210 requires the Magistrate to frame a charge, declaring with what offence the accused is charged, on being satisfied that there are sufficient grounds for committing the accused for trial. In this Chapter also, Chapter XVIII, there is no provision (indeed there could not be) similar to section 246. It is also noticeable that neither in this Chapter nor in the Chapter relating to the trial of warrant cases is to be found any provision restricting the Magistrate to the offence or offences which may have been specified in the initial complaint or police report. The power of the Court to frame charges is governed by the general provisions contained in Chapter XIX which seem to enable the Court to frame such charges as may be justified by the evidence produced, irrespective of the particular offence or offences of which cognizance may have been taken under section 190(*1*) at the initial stage. Thus section 236 provides for the framing of alternative charges, and section 235 for the framing of charges relating to connected acts or omissions. Section 227 empowers the Court to add to charges, and section 230 provides that if the offence stated in the new or altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has already been obtained for a prosecution on the same facts as those on which the new or altered charge is founded. As the Code now stands, "previous sanction" is necessary in the case of offences dealt with under section 197 which provides that no Court

shall *take cognizance* of such offences except with the previous sanction of the local Government. We may thus have a charge framed of an offence of which cognizance cannot be taken without previous sanction; but the framing of the charge can only follow the taking of cognizance, and yet the section does not speak of or provide for taking cognizance. It seems to me that the reason for this is that the power of framing charges comes into operation well after the initial requisite of taking cognizance under section 190(*1*), and that this power is not restricted to the offender or the specific sections, if any, mentioned by the prosecutor. A complaint, as defined in section 4(*h*) need not in fact specify any offender or even the section of the law which makes an act or omission punishable; and cognizance is taken under section 190(*1*) (*a*) upon receiving a complaint of facts which constitute an offence, while charges are framed on the evidence before the trial Court. The evidence may, and not infrequently does, disclose offences other than those originally mentioned or implied, but it cannot be said that cognizance is taken of such new offences under clause (*c*) of sub-section (*1*) of section 190, for the double reason that the stage for the application of the sub-section itself is long past and the clause can have no application to the evidence produced in the case. Similar observations apply to cases in which cognizance has been initially taken under clause (*b*) upon a police officer's written report of facts constituting an offence. It has in fact been repeatedly held that when a Magistrate has taken cognizance of an offence upon a complaint or upon a police report, any offence that may be disclosed by the evidence may be dealt with at the trial; and that section 190(*1*) (*c*) and section 191 have no application in such circumstances.

My learned brother has pointed out how in *Jagat Chandra Mazumdar* v. *Queen-Empress*(1) it was

(1) (1899) I. L. R. 26 Cal. 786.

1933

BALDEO PRASAD v. KING-EMPEROR.

DHAVLE, J.

held that section 190(*1*) (*c*) did not apply where, after taking evidence, a Magistrate had proceeded against a person originally complained against, and another, for an offence other than the offences mentioned in the complaint on which cognizance has been initially taken. In *Dedar Buksh* v. *Symapadadas Malakar*(1) the trying Magistrate who had no power to take cognizance under section 190(*1*) (*c*) found after examining some witnesses, that though there was no satisfactory evidence against the original accused, there was sufficient evidence against other persons, and issued processes against such other persons for offences, not all of which were specified in the original complaint, and it was held that the Magistrate's proceedings were not bad, notwithstanding the facts that he had no power to take cognizance under clause (*c*) of section 190(*1*) and that the complainant had presented a petition before him for the withdrawal of the complaint and its dismissal as untrue. *Charu Chandra Das* v. *Narendra Krishna Chuckerbutty*(2) was a case where cognizance had been initially taken on a police report; the police sent up one person who was tried and convicted, and the Magistrate then, on the evidence of one of the witnesses, proceeded against two other persons. The Magistrate was not empowered to take cognizance under clause (*c*) of sub-section (*1*) of section 190, but Prinsep and Hill, JJ. held that the Magistrate was entitled to proceed as he had done, and that "having taken cognizance of the offence it was his duty to proceed to deal with the evidence brought before him and to see that justice was done in regard to any person who may be proved by the evidence to be concerned in that offence." In *Abdul Rahman* v. *Emperor*(3) it was urged that the subject-matter of the second charge framed against Abdul Rahman not having been disclosed either in

(1) (1914) I. L. R. 41 Cal. 1013.
(2) (1900) 4 Cal. W. N. 364.
(3) (1925) 94 Ind. Cas. 717.

the complaint or in the examination of the complainant, the trying Magistrate could only have taken cognizance of the offence under section 190(*1*) (*c*) and that as he had not followed the provisions of section 191, his proceedings in connection with that charge were illegal and void. The contention was negatived by Maung Ba and Doyle, JJ. and when the matter was taken up to the Privy Council, their Lordships took the same view and observed that the Magistrate had formulated the second charge as he had formulated the first in consequence of the one complaint. Their Lordships distinguished the case of *Emperor v. Chedi*(1) as a case in which, while trying one person, the Magistrate found occasion to formulate a charge against some one else.

The present is not a case where a charge has been framed against a person not originally accused, but a case in which a second charge was formulated, as was the first, on evidence taken in consequence of the one police report on which cognizance was initially taken by a competent Magistrate under clause (*b*) of section 190(*1*).

Mr. Sahay has referred to the evidence of the Sub-Deputy Collector who set the police in motion that he had not mentioned in what he calls his complaint to the police the defalcation of the Provident Fund monies. But the witness's initial communication to the Sub-Inspector of Police was that the appellant had " committed defalcation with regard to certain items of money ", and the list of items totalling Rs. 1,887 which was attached was described as " a list of some of these " (items of money). The defalcation had come to light when the auditor from the local Audit Department audited the accounts of the Estate, and it was after evidence had been given by the prosecution of the defalcation, not only of the items totalling Rs. 1,887 but also of the Provident Fund monies, that the trying Magistrate

(1) (1905) I. L. R. 28 All. 212.

1933

BALDEO PRASAD v. KING-EMPEROR.

DHAVLE, J.

framed the two charges on one of which the appellant was ultimately given the benefit of the doubt and of the other he was convicted. It seems clear that the trying Magistrate, who was not empowered to take cognizance under clause (*c*) of sub-section (*1*) of section 190 did not (as indeed he could not) take cognizance of any offence under clause (*c*), but that being properly in seisin of the whole case on its transfer to him by the Subdivisional Magistrate, he had authority, on the evidence, to frame a charge with respect to the Provident Fund monies as well.

Rule discharged.

REVISIONAL CRIMINAL.

Before James and Dhavle, JJ.

1933.

Mar. 21.

SITARAM AHIR

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (Act V of 1898), section 123—person affected by the order, whether should have opportunity of being heard before final order.

The person affected by the order under section 123, Code of Criminal Procedure, 1898, must have an opportunity of being heard before the final order is made under that section.

Emperor v. *Amir Bala*(1), followed.

The facts of the case material to this report are stated in the judgment of James, J.

Mahabir Prasad and *Tarakeshwar Nath*, for the petitioners.

Assistant Government Advocate, for the Crown.

* Criminal Revision no. 88 of 1933, from an order of R. C. Chaudhuri, Esq., Sessions Judge of Shahabad, dated the 10th December, 1932, modifying an order of Babu Sukhdeo Narain, Subdivisional Magistrate of Buxar, dated the 9th September, 1932.

(1) (1911) I. L. R. 35 Bom. 271.