i.e., one day before he decided the case in which Khan Muhammad gave his evidence. Proceedings were subsequently stayed pending the decision of the appeal of the accused persons by the High Court and within a few days after the decision of the appeal Mr. Malan passed the order complained of. I, therefore, see no force in either of counsel's contentions and I reject the application.

A. R.

Revision dismissed.

Appellate Criminal.

Before Mr. Justice Campbell.

BYRNE—APPELLANT, 1922

versus *Nov. 29.*

THE CROWN—RESPONDENT.

Criminal Appeal No. 827 of 1922.

Criminal Procedure Code, Act V of 1898, sections 254, 256, 342, 537—Examination of accused by Court—whether necessary after cross-examination of prosecution witnesses recalled after charge —omission to examine accused again at that stage - whether an illegality or a mere irregularity.

In the present case the accused was questioned by the Magistrate under section 342 of the Code of Criminal Procedure before the charge was framed and after all the witnesses for the prosecution had been examined and cross-examined at considerable length. After the charge was framed most of the witnesses were recalled for a further lengthy cross-examination, at the termination of which the Magistrate proceeded to record the defence evidence without questioning the accused again.

Held, that although it may often be desirable that the accused should be asked, after the further cross-examination of witnesses for the prosecution recalled after the charge has been framed, whether he wishes the Court to record any additional explanation, section 342 of the Code of Criminal Procedure cannot be interpreted as conveying a peremptory direction to that effect if the Court has already questioned the accused before the charge, when the case for the prosecution has been closed and the witnesses for the prosecution have been cross-examined.

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Sections 254 *and* 256 *of the Code of Criminal Procedure*, referred to.

Held also that, if there is any such direction, failure to comply with it amounts to no more than an omission in the proceedings during trial within the meaning of section 537 of the Code, and is no ground for setting aside the findings of the trial Court unless it has occasioned a failure of justice.

Mitarjit Singh v. *King-Emperor* (1), distinguished.

Appeal from the order of E. J. Stephens, Esquire, Justice of the Peace and Magistrate, 1st Class, Ferozepore, dated the 29th August 1922, *convicting the appellant.*

KASHI RAM, for Appellant.

MEHR CHAND, Mahajan, for the Government Advocate, for Respondent.

CAMPBELL J.—The appellant R. A. Byrne has been tried as an European British subject by a Justice of the Peace and Magistrate of the first class, Ferozepore, on three charges under section 409, Indian Penal Code, has been found guilty on each charge and has been sentenced to an aggregate of six months' rigorous imprisonment and a fine of Rs. 400. The finding of the Magistrate is as follows :—

The appellant, Byrne, was Station Electrical Engineer, Ferozepore, up to 31st August 1921. On 1st March he presented a cheque for Rs. 98-7-0 at the Alliance Bank of Simla, Ferozepore, received payment and failed to account for the money or to deposit it in the Government Treasury. The cheque had been sent to him by the Quartermaster of the Welch Regiment in payment of a charge due to Government. It was drawn by Lieutenant Allen of the Welch Regiment on the 2nd February 1921 in favour of the Quartermaster or bearer. It was endorsed on the back by Lieutenant Edwards, the Quartermaster, and was further endorsed "pay self" and signed by the appellant. The original words written were "pay to *Babu* Munsa Ram", but the last four words were scored through and the word "self" written above. This cheque and its proceeds were the subject of the first charge and it was found by the learned Magistrate that the appellant being a public

(1) (1921) 6 Pat. L.J. 644.

servant had committed criminal breach of trust in respect of them and for the offence he was sentenced to three months' imprisonment and a fine of Rs. 200 with three weeks' further imprisonment in default of payment of fine.

Subsequently, so the Magistrate holds, on the 21st March 1921 the proceeds of a similar cheque for Rs. 269-3-3, dated 18th March, were misappropriated by the appellant, his endorsement in this case being confined to his own signature. Finally, on the 4th May 1921, the appellant received Rs. 119-8-0 in cash from the Quartermaster of the Welch Regiment and omitted to show it in his accounts or credit it in the Treasury. The appellant was charged separately with an offence under section 409 for each of these amounts and was found guilty on both charges. He was sentenced for the two offences to a further term of three months' rigorous imprisonment and another fine of Rs. 200 with three weeks' imprisonment in default of payment. The two sentences of imprisonment were ordered to run consecutively.

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It remains to notice a last plea raised on behalf of the appellant that the whole trial was vitiated by the omission of the Magistrate to question the appellant at the end of the cross-examination of the witnesses for the prosecution after the charge had been framed. The plea is based upon a judgment by a Division Bench of the Patna High Court, *Mitarjit Singh* v. *King-Emperor and others* (1). The correctness of that decision need not be discussed for the case is distinguishable on its facts from the present case. The report of *Mitarjit Singh and others* v. *King-Emperor* (1) indicates that the accused were questioned by the Magistrate after the examination-in-chief of the prosecution witnesses and before there had been any cross-examination at all, and that after the subsequent cross-examination (whether this was before or after the framing of the charge is not stated) they were not questioned again. It was held by the High Court that the word "examined" in section 342, Code of Criminal Procedure, includes

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cross-examination and re-examination, that the provisions of section 342 being mandatory, the Magistrate had no option but to examine the accused after the cross-examination of all prosecution witnesses, that not having done so he had omitted to do something in regard to which he had no discretion, that consequently he had committed an illegality and not merely an irregularity and that the case must be reheard from the stage at which the trial became illegal.

In the present case the accused was questioned very fully and very fairly by the learned Magistrate after all the witnesses for the prosecution had been examined and cross-examined at considerable length and before the charge was framed. After the charge was framed most of the witnesses were recalled for a further lengthy cross-examination, at the termination of which the Magistrate proceeded to record the defence evidence without questioning the accused again.

Section 342, Criminal Procedure Code, requires the Court to question the accused generally on the case after the witnesses for the prosecution have been examined and before the accused is called on for his defence. This injunction has been carried out by the Magistrate in the present case and at the stage indicated in the rules of procedure for the trial of warrant cases—*vide* section 254. Section 256 is the section under which the accused is enabled to recall the prosecution witnesses for further cross-examination after the charge has been framed, and, while making it clear that the accused does not enter upon his defence until the termination of such cross-examination, that section says nothing about any second examination of the accused after the further cross-examination. It is often, no doubt, desirable that the accused should be asked at this stage whether he wishes the Court to record any additional explanation, but I am not convinced that section 342 can be interpreted as conveying a peremptory direction to that effect, if the Court has already questioned him before the charge, when the case for the prosecution has been closed and the prosecution witnesses have been cross-examined. If there is any such direction, failure to comply with it would amount in my opinion to no more than an omission in the proceedings during trial within the meaning of section 537, of which the accused

will obtain full advantage if he satisfies the Court of appeal or revision that it has occasioned a failure of justice, but which otherwise is no ground for setting aside the finding of the trial Court.

The reason for questioning the accused is set forth in section 342 and is to enable him to explain any circumstance in the evidence appearing against him. An accused person does not recall the prosecution witnesses for the purpose of discovering fresh circumstances against himself. The Code expressly forbids a Court of appeal to set aside a conviction on account of such flagrant illegalities as omission to frame a charge or disregard of the directions contained in section 195 (which directions are no less explicit than those of section 342), unless a failure of justice has been occasioned, and it would be absurd, in my opinion, to hold that in a case like the present a conviction must be set aside for no other reason than that the Magistrate has not subjected the appellant to a second examination after a second cross-examination of the prosecution witnesses.

Rulings relating to cases where the Magistrate has not questioned the accused at all in terms of section 342 manifestly have nothing to do with the present case and need not be discussed.

When asked what particular questions the Magistrate should have put to the appellant after the second cross-examination the latter's learned counsel is unable to suggest anything the answer to which would have had any effect on the case for the defence, and I am satisfied that no failure of justice has been occasioned by the omission to question a second time.

The result is that the convictions under the first two charges are maintained while the appeal is accepted to the extent that the conviction under the third charge is set aside.

I have heard the appellant's learned counsel on the question of sentence. I see no reason to remit any portion of the sentences of imprisonment, but, in view of the acquittal of the appellant on the third charge, the second sentence of Rs. 200 fine with three weeks' rigorous imprisonment in default of payment is set aside and the amount if paid will be refunded.

C. H. O. *Appeal accepted in part.*