

by the party who ought to have brought this precedent to the notice of the Court, and, therefore, he cannot apply for review of the judgment and decree on this ground unless he can show that his failure to bring it to notice was excusable.

In the present case it is not suggested that the applicant, as respondent in the second appeal, had any excuse whatever for not bringing to my notice the case of *Maung Ni and one v. Maung Aung Ba* (1). Consequently this application for review fails and is rejected with costs, advocate's fee five gold mohurs.

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## CRIMINAL REVISION.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.*

### KING-EMPEROR v. MAUNG PO SAW.\*

1934  
Dec. 19.

*Summary trial—Record of evidence—Notes and memoranda of evidence not a part of the record of the case—Regular trial in Summons and Warrant cases—Criminal Procedure Code (Act V of 1898), ss. 263, 264, 355, 356, Ch. XXII.*

In a summary trial under Chapter XXII of the Criminal Procedure Code, whether an appeal lies under s. 264 of the Code or no appeal lies under s. 263, in either case there is no obligation upon the magistrate or Bench of magistrates to record the evidence of the witnesses at the trial. Sections 355 and 356 of the Code apply to the evidence taken at the trial of a summons-case and a warrant-case respectively, but have no application to a summary trial. If in a summary trial a magistrate or Bench of magistrates elect to take notes or make a memorandum of the evidence such notes or memoranda form no part of the record of the case, and are not to be included either in the main file or in the process file of the record of the case.

*Emperor v. Chimanlal*, 29 Bom. L.R. 710; *Emperor v. Ismail*, I.L.R. 49 All. 562; *Emperor v. Tewari*, I.L.R. 49 All. 261; *Madhab Chandra Saha v. Emperor*, I.L.R. 53 Cal. 738; *Kuchi v. King-Emperor*, 3 L.B.R. 3; *In re Tippanna*, 36 Bom. L.R. 212—*referred to*.

*Satish Chandra Mitra v. Manmatha Nalh Mitra*, I.L.R. 48 Cal. 280—*dissented from*.

(1) (1926) I.L.R. 4 Ran. 227.

\* Criminal Revision No. 949A of 1934 arising out of Criminal Summary Trial No. 21 of 1934 of the Second Class Honorary Magistrates of Yamethin.

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*Tan Byn* (Assistant Government Advocate) for the Crown. Under s. 263 of the Code of Criminal Procedure the magistrate or Bench of magistrates need not record the evidence or frame a charge where no appeal lies; and s. 264 (1) merely enjoins such magistrate or Bench to record a judgment embodying the substance of the evidence in appealable cases. Under sub-section (2) the judgment is the only record. If the above sections are read with s. 354 it is clear that the depositions of witnesses do not form part of the record in summary trials, and that s. 355 does not apply to such trials, but is intended to apply only where cases which could have been tried summarily are in fact tried in the ordinary manner. *Kuchi v. King-Emperor* (1). The decision in *Satish Chandra Mitra v. Manmatha Nalh Mitra* (2) which took a contrary view was not followed in *Emperor v. Mantu Tiwari* (3); *Emperor v. Ismail* (4); *Emperor v. Chimanlal Maneklal* (5); *Madhab Chandra Saha v. Emperor* (6); *In re Tippanna Koutya Mannavaddar* (7) and *The Crown v. Salig Ram* (8).

PAGE, C.J.—This case raises a question of procedure of general interest. Maung Po Saw was tried in a summary trial by a Bench of magistrates at Yamethin for an offence under section 279, Indian Penal Code. He was acquitted, and in revision the learned Sessions Judge of Pyinmana refused to interfere with the order under which the accused was acquitted.

The case has now been brought before the High Court in revision. As regards the substance of the

(1) 3 L.B.R. 3.

(2) I.L.R. 48 Cal. 280.

(3) I.L.R. 49 All. 261.

(4) I.L.R. 49 All. 562.

(5) 29 Bom. L.R. 710.

(6) I.L.R. 53 Cal. 738.

(7) 36 Bom. L.R. 212.

(8) I.L.R. 7 Lah. 303.

case this Court sees no reason for differing from the conclusion at which the magistrates arrived, and I am of opinion that there is no ground which would justify the Court in revising the order of the magistrates by which the accused was acquitted.

It appears, however, that the magistrates made a memorandum of the evidence adduced at the trial, and that in passing his order in revision the learned Sessions Judge directed that the memorandum of the evidence of the witnesses should be filed in the main file of the case, and not in the process file. In these circumstances the question arises whether in a summary trial under Chapter XXII of the Criminal Procedure Code (Act V of 1898 as amended) any memorandum of the evidence that may have been made by the magistrate, or Bench of magistrates as the case may be, ought to be included either in the main file or in the process file as forming part of the record of the case. There is a conflict of opinion between the High Courts in India upon this question, and for the purpose of solving the problem it is necessary, I think, that the Court should bear steadily in mind the distinction between the regular trial of a summons-case and a summary trial. If that is done, in my opinion, the solution of the problem presents no difficulty.

Under section 4 (1) (v) of the Criminal Procedure Code

“‘summons-case’ means a case relating to an offence and not being a warrant-case”; and

“(w) ‘warrant-case’ means a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months.”

Now, a summons-case or a warrant-case may either be tried in a regular trial under Chapter XX or Chapter XXI respectively, or in cases which

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fall within Chapter XXII in a summary trial under that Chapter. If a summons-case is tried under Chapter XX of the Code section 355 applies, and the memorandum of the substance of the evidence taken under section 244 of the Code forms part of the record of the case. In like manner the provisions of section 356 of the Code apply to the evidence taken at the trial of a warrant-case that is regularly tried under Chapter XXI. But the procedure in respect of the taking and recording of evidence in a summary trial of a summons-case or of a warrant-case under Chapter XXII differs from the procedure laid down for taking and recording evidence in a regular trial of a summons-case under Chapter XX or of a warrant-case under Chapter XXI. I am clearly of opinion,—indeed it appears to me to be obvious,—that sections 355 and 356 of the Code have no application to a summary trial under Chapter XXII of the Code.

Now, the method laid down for taking evidence in a summary trial is prescribed in sections 263, 264 and 265 of the Code, and in my opinion in a summary trial, whether an appeal lies under section 264 of the Code or no appeal lies under section 263, in either case there is no obligation upon the magistrate or Bench of magistrates to record the evidence of the witnesses at the trial; the intention of the Legislature being that in a summary trial neither time nor labour should be expended upon a formal memorandum recording the testimony of the witnesses [*Kuchi v. King-Emperor* (1)]. Under section 263 (h) of the Code it suffices that particulars should be entered on the record of “the finding, and, in case of a conviction, a brief statement

of the reasons therefor"; and in a case under section 264 it is incumbent upon the magistrate or a Bench of magistrates to "record a judgment embodying the substance of the evidence and also the particulars mentioned in section 263", and it is therein further provided that "such judgment shall be the only record in cases coming within this section."

I am of opinion, and it must be assumed, that if a magistrate or Bench of magistrates in a summary trial elect to take notes or make a memorandum of the testimony of the witnesses they do so, not because it is incumbent upon them to make such notes or memorandum, but because they find it convenient to do so in their own interest. Such notes or memoranda, however, are and remain private documents belonging to the magistrates who compiled them, and form no part of the record of the case. For these reasons I am of opinion that such notes or memoranda are not to be included either in the main file or in the process file of the record of the case. The view which I am disposed to take upon this question is in consonance with that which has been expressed by the Bombay High Court in *In re Tippanna Koutya Mannavaddar* (1) and by the Allahabad High Court in *Emperor v. Mantu Tiwari and others* (2) and *Emperor v. Ismail and others* (3). The same view had previously been expressed, so far as a summary trial under section 264 of the Code was concerned, by the Bombay High Court in *Emperor v. Chimanlal Maneklal* (4), although I am not satisfied, as at present advised, that Patkar and Fawcett JJ. in that case expressed the law correctly

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(1) 36 Bom. L.R. 212.

(2) (1926) I L.R. 49 All. 261.

(3) (1927) I.L.R. 49 All. 562.

(4) 29 Bom. L.R. 710.

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in the observations which fell from them in connection with section 260 of the Code. A Divisional Bench of the Calcutta High Court, however, in *Satish Chandra Mitra v. Manmatha Nath Mitra* (1) took a different view. In that case Mookerjee O.C.J. and Fletcher J. held that section 355 of the Code applied to a summary trial under section 263, and further that if a magistrate in fact records the evidence in a trial under section 263 the memorandum of the evidence so recorded becomes part of the record of the case. With all due respect, in my opinion, in so holding Mookerjee O.C.J. and Fletcher J. on both points failed to enunciate the law correctly. For the reasons that I have stated, and as I apprehend the material sections of the Criminal Procedure Code, any note or memorandum of the evidence that is made by a magistrate in a summary trial either under section 263 or section 264 forms no part of the record of the case, and ought not to be included therein. As regards the opinion expressed by the learned Judges in that case that "section 263 must be read with section 355", it is enough to say that if regard is had to section 354 of the Code and to the distinction between the regular trial of a summons-case and the summary trial of a case it appears to me, with all due deference, to be manifest that section 355 has no application to the summary trial of a case under Chapter XXII of the Code. In my opinion *Satish Chandra Mitra v. Manmatha Nath Mitra* (1) was wrongly decided, and ought not to be followed; [see also *Madhab Chandra Saha v. Emperor* (2)].

MYA BU, J.—I agree.

(1) (1920) I.L.R. 48 Cal. 280.

(2) (1926) I.L.R. 53 Cal. 738.