

REVISIONAL CRIMINAL.

Before Young C. J. and Sale J.

FAZAL—Petitioner,

versus

THE CROWN—Respondent.

1939

June 12.

[Criminal Revision No. 118 of 1939.]

Criminal Procedure Code (Act V of 1898), SS. 208, 211, 212, 213, 288 and 347 — trial of accused — warrant case — charge framed — Magistrate deciding to commit under S. 347 — Whether required to start proceedings de novo — Statement recorded by Magistrate prior to commitment — Whether can be transferred under S. 288 and used as substantive evidence — prejudice to accused — question of.

The trial of the accused started before the Additional District Magistrate as a warrant case under s. 304, Part II, Indian Penal Code. After the charge had been framed under s. 304, Part II, the Additional District Magistrate changed his mind and committed the accused to stand his trial before the Sessions Court, as he was entitled to do under the provisions of s. 347, Criminal Procedure Code. In the course of the trial the Sessions Judge directed the transfer of the statements of certain prosecution witnesses recorded by the Magistrate to the Sessions record as substantive evidence under s. 288, Criminal Procedure Code. It was contended on behalf of the defence (i) that as the initial proceedings had taken place under Chapter XXI of the Code of Criminal Procedure governing the trial of warrant cases, and not under Chapter XVIII which deals with the enquiry preliminary to commitment, the statements could not be so transferred and that the accused would be materially prejudiced by the transfer of such statements as substantive evidence, (ii) that the commitment should be quashed, and (iii) that where a Magistrate acting under s. 347, Criminal Procedure Code, decides to commit an accused person to the Sessions Court, he should start proceedings *de novo* under Chapter XVIII of the Criminal Procedure Code. The Sessions Judge referred the case to the High Court.

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Held, that a Magistrate is not required to take proceedings *de novo* under Chapter XVIII, Criminal Procedure Code, when he decides to commit the accused to the Sessions Court, provided always that the requirements of ss. 208, 211, 212, 213 are carefully observed.

Held also, that provided a Magistrate in acting under s. 347, Criminal Procedure Code, commits the accused subject to the safeguards to which he is entitled as mentioned above, any statement recorded by the Magistrate in the presence of the accused prior to the commitment would be the evidence of a witness duly recorded under Chapter XVIII and may, therefore, be transferred and treated as substantive evidence in the trial before the Sessions Court.

Held further, that, in the circumstances, there was no question of prejudice and, therefore, the proceedings should not be quashed.

Case reported by Sardar Kartar Singh, Sessions Judge, Hoshiarpur, with his No.197 of 18th January, 1939.

Nemo, for Petitioner,

MOHAMMAD MONIR, Assistant to the Advocate-General, for Respondent.

REPORT OF THE SESSIONS JUDGE.

Fazal accused was challaned under section 304, Indian Penal Code, by the Saddar Hoshiarpur Police. His trial commenced as a warrant case. The learned Additional District Magistrate, Hoshiarpur, examined six witnesses for the prosecution and charged him under section 304, Part II, Indian Penal Code, for having committed culpabale homicide not amounting to murder of *Mussammatt* Shidan, aged about two years, on 20th October, 1938. The accused pleaded "not guilty" and offered to produce defence evidence. The case was ordered to come up on 21st October, 1938, for further proceedings. He was questioned whether

he wished to cross-examine any of the prosecution witnesses. He replied that he wanted to cross-examine all of them. *Mussammat Dauli* (P. W. 1) was recalled and the counsel for the accused cross-examined her. Then the counsel declined to cross-examine the remaining prosecution witnesses. The learned Magistrate changed his mind and came to the conclusion that a *prima facie* case of murder under section 302, Indian Penal Code, has been made out against the accused and the case was adjourned to 3rd November, 1938, for recording the statements of the remaining prosecution witnesses. One witness was examined on that date and the case was again adjourned to 17th November, 1938, when another formal witness was examined. The prosecution closed the evidence and the case was ordered to come up on 19th November, 1938, when he was charged under section 302, Indian Penal Code, and the order of commitment to this Court was also passed on the same date.

The case was taken up yesterday with the help of the assessors. *Abdul Rahman* (P. W. 2) and *Mussammat Umdan* (P. W. 3) were examined, but it appears that they made different statements on important facts, from those which they made in the Court of the Committing Magistrate. The learned Public Prosecutor moved me to have their statements recorded by the Committing Magistrate transferred to this record under section 288, Criminal Procedure Code, which was ordered to be done. The prosecution evidence and the defence evidence were finished yesterday and the case was argued by counsel for the defence at some length to-day. He pointed out that the statements of *Abdul Rahman* and *Mussammat Umdan* could not be treated as evidence against the accused, inasmuch as

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these statements had not been recorded under Chapter XVIII of the Criminal Procedure Code, which was necessary to be done before their statements would be treated as evidence in the case under section 288, Criminal Procedure Code. He further urged that the order of commitment was erroneous in law, inasmuch as the trial of the accused had commenced before the Additional District Magistrate as a warrant case and no enquiry was made as required by Chapter XVIII before the commitment could be made. He has referred me to *Nagendra Nath Sarkar v. Emperor* (1), a Division Bench ruling, and to the Madras authority reported as *Lakshminarayana v. Suryanarayana* (2).

The Public Prosecutor has urged, on the strength of *Abdul Gani Bhuya v. Emperor* (3), that the statements of Abdul Rahman and *Mussammatt Umdan* should be taken as 'duly recorded under Chapter XVIII' within the meaning of section 288 of the Criminal Procedure Code, and maintains that the point before the Court was specifically gone into in this ruling, but it was not considered in *Nagendra Nath Sarkar v. Emperor* (1), and the previous ruling reported as *Abdul Ghani Bhuya v. Emperor* (3) was not referred to in the ruling of 1932.

No doubt, this is so, but it is important to remember that the Public Prosecutor intends to rely on the statements of these two witnesses as substantive evidence against the accused. As reported in *Lakshminarayana v. Suryanarayana* (2), the accused had no opportunity to adduce his evidence before the committal. He has two opportunities to adduce such an evidence,—one before the charge was framed and

(1) 1932 A. I. R. (Cal.) 683.

(2) 1932 A. I. R. (Mad.) 502.

(3) I. L. R. (1926) 53 Cal. 181.

second to get the charge set aside if he could induce the magistrate to do so by further defence evidence after the charge. Further, it is held in the same authority that there was no doubt now, with the omission of the words " he shall stop further proceedings " in section 347, Criminal Procedure Code, that when a Court trying a warrant case determined to commit a case, it must follow the procedure under Chapter 18. The learned counsel for the defence argues that his client has been materially prejudiced by the non-observance of this procedure and the evidence now sought to be relied upon may not have been of any use to the prosecution, if he had the opportunity to produce his evidence as said before. The Public Prosecutor on the other hand argues that the accused had produced his defence and had more opportunities of cross-examining the prosecution witnesses than he would have had under Chapter XVIII, and therefore there has been no prejudice to the accused. I do not uphold this contention, inasmuch as the right of the accused to examine his defence both before the charge and after the charge was not allowed to be exercised in the present proceedings, and if this had been allowed to be done, perhaps there would not have been a case for the committal of the accused at all.

In the circumstances, I must hold that the accused would be materially prejudiced, if the statements of these two witnesses are allowed as evidence against him, without allowing him to avail of the legal provisions of sections 208 and 212 of the Criminal Procedure Code.

I have no power under the law to quash the commitment order and it is only the High Court, who can do so under section 215, Criminal Procedure Code, at

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any stage in the case,—vide *Hari Chand Misra v. Emperor* (1). Therefore, I submit the record to the Hon'ble High Court for any order which it may deem fit to pass.

The assessors are now discharged.

The accused should be kept in the jail as before.

The order of Din Mohammad J. referring the case to a Division Bench, dated 28th March, 1939.

DIN
MOHAMMAD J.

DIN MOHAMMAD J.—This case has been reported by the Sessions Judge, Hoshiarpur, in the following circumstances :—

One Fazal was sent up to undergo his trial under section 304, Indian Penal Code, in the Court of a Magistrate, 1st Class, with enhanced powers under section 30 of the Code of Criminal Procedure. On the 20th October, 1938, the Magistrate started the trial of the case as a warrant case under Chapter XXI of the Code of Criminal Procedure, and on the same date after recording partial evidence he even framed a charge against the accused under section 304, Part 2, Indian Penal Code. Action under section 256 of the Code of Criminal Procedure was then taken and the case was adjourned to the following day for further proceedings. On that date, one prosecution witness was cross-examined and the cross-examination of the remaining witnesses was given up by counsel for the defence. On that date, the Magistrate recorded an order that in his opinion there was a *prima facie* case under section 302, Indian Penal Code, and that he would amend the charge after the whole prosecution evidence was recorded and commit the accused for trial to the Court of Session. On the 3rd November and again on the 17th November the remaining prosecution

evidence was recorded and the case was adjourned to the 19th November for further proceedings. On that date, he framed a charge against the accused under section 302, Indian Penal Code, and committed the case to the Court of Session.

The trial of the accused began on the 12th January, 1939, and inasmuch as certain prosecution witnesses resiled from the statements made by them previously in the Court of the Magistrate, a question arose whether those statements could be treated as evidence in the case under section 283, Criminal Procedure Code. Counsel for the accused urged that inasmuch as no regular proceedings had been recorded under Chapter XVIII of the Code of Criminal Procedure, which is a condition precedent under section 288, those statements could not be treated as evidence at the trial. This proposition was, however, resisted by counsel for the Crown. The Sessions Judge after completely recording the prosecution as well as the defence evidence, stayed further proceedings and on the following day recorded an order as stated above recommending that the commitment being illegal it should be quashed.

There is unfortunately no authority of this Court dealing with the matter and the decisions of the other High Courts in India are conflicting. In *Nagendra Nath Sarkar v. Emperor* (1), *Lakshminarayana v. Suryanarayana* (2), *Damodaram In Re.* (3), *Emperor v. Channing Arnold* (4) and *In re Chinnavan* (5) it is laid down that unless the provisions of law are fully observed and the commitment proceedings are regularly

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(1) 1922 A. I. R. (Cal.) 633.

(3) I. L. R. (1929) 52 Mad. 995.

(2) 1932 A. I. R. (Mad) 502.

(4) (1912) 17 I. C. 813, (F. B.).

(5) (1914) 23 I. C. 734.

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taken under Chapter XVIII, the order of commitment is bad. *Abdul Gani Bhuya v. Emperor* (1) and *K. R. Bhat v. Emperor* (2), however, lay down to the contrary. *Nagendra Nath Sarkar v. Emperor* (3) is later than *Abdul Gani Bhuya v. Emperor* (1).

The question involved in this case is important and it is likely to arise very frequently. Section 347 of the Code of Criminal Procedure says that if in any enquiry 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, he shall commit the accused under the provisions *herein-before contained*. Prior to 1923 the words "he shall stop further proceedings and" existed before the word "commit" but they were deleted by the Criminal Law Amendment Act, 1923. Construed literally, it would be obligatory upon a Magistrate to follow the procedure as laid down in Chapter XVIII and it is obvious that that procedure is different from the procedure to be followed in the trial of warrant cases. Under Chapter XVIII an accused person can offer defence at two stages, *i.e.*, under section 208 (1) as of right and under section 212 at the discretion of the Magistrate: while in the trial of a warrant case he can only offer defence after a charge has been framed and at no other stage. If the trial of an accused person therefore starts under Chapter XXI and is at a later stage converted into a trial under Chapter XVIII, he is apparently prejudiced and this circumstance has prevailed with those learned Judges who have held that a commitment in such circumstances is bad.

(1) I. L. R. (1926) 53 Cal. 181.

(2) 1931 A. I. R. (Bom.) 517.

(3) 1932 A. I. R. (Cal.) 683.

Further, in section 288 of the Code of Criminal Procedure, the words "duly recorded in the presence of the accused under Chapter XVIII" were for the first time added by the Criminal Law Amendment Act, 1923, and cannot be lightly ignored. I am personally inclined, therefore, to the view that if a Magistrate acts under section 347 of the Code of Criminal Procedure, he should start proceedings *de novo* under Chapter XVIII, otherwise the commitment will be bad. But as the point is important and there is a conflict of authority. I refer the case to the Hon'ble the Chief Justice for such action as he deems necessary.

The Order of the Division Bench was delivered by—

SALE J.—This is a reference by a learned Judge of this Court sitting in Single Bench in a matter reported on the Criminal revision side by the Sessions Judge of Hoshiarpur relating to a Sessions trial at present pending before him.

The material facts have been set forth in the order of reference and need not be recapitulated here in detail. Briefly stated, the trial of the accused started before the Additional District Magistrate, Hoshiarpur, as a warrant case under section 304, Part II, Indian Penal Code. After the charge had been framed under section 304, Part II, the Additional District Magistrate changed his mind and committed the accused to stand his trial before the Sessions Court as he was entitled to do under the provisions of section 347, Criminal Procedure Code. It is not suggested that the action of the Magistrate from the point at which he decided to commit the accused was not in accordance with the procedure laid down under

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Chapter XVIII of the Criminal Procedure Code, which deals with the enquiry preliminary to commitment, in so far as it was applicable.

In the course of the Sessions trial the Sessions Judge, at the instance of the prosecution, directed the transfer of the statements of certain prosecution witnesses recorded by the Magistrate to the Sessions record as substantive evidence under section 288, Criminal Procedure Code. At the time of final arguments before the Sessions Judge it was urged, on behalf of the defence that as the initial proceedings had taken place under Chapter XXI of the Code of Criminal Procedure, governing the trial of warrant cases, and not under Chapter XVIII, which deals with the enquiry preliminary to commitment, the statements could not be so transferred; and the Sessions Judge held that the accused would be materially prejudiced if the statements of these two witnesses were allowed as substantive evidence and referred the case to the High Court with the suggestion that the commitment be quashed.

In referring the case to us the learned Single Judge has expressed the view that where a Magistrate acts under section 347 of the Code of Criminal Procedure, he should start proceedings *de novo* under Chapter XVIII of the Criminal Procedure Code, and that otherwise the commitment would be bad.

There appear to be three points for our decision in this case :—

(1) Whether the accused would be prejudiced in this case by the transfer of certain statements under section 288, Criminal Procedure Code, if used as substantive evidence against him ?

(2) Whether the commitment should be quashed?

(3) Whether as a rule of practice, a Magistrate who acting under section 347, Criminal Procedure Code, decides to commit an accused to the Sessions Court, should start proceedings *de novo* under Chapter XVIII of the Criminal Procedure Code?

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It will be convenient first to deal with point No. 3. No authority of this Court has been cited before us by the learned Assistant Advocate-General. There is nothing in section 347, Criminal Procedure Code, to suggest that where a Magistrate decides to commit under that section he should be required to commence proceedings *de novo* under Chapter XVIII. To lay down any general rule, as is suggested by the learned referring Judge, that a Magistrate if he decides to commit under section 347, Criminal Procedure Code, should invariably commence proceedings *de novo* under Chapter XVIII would, in our opinion, lead to intolerable delays in the trial of criminal cases without any compensating advantage to the accused or to the prosecution. What is necessary is that as soon as a Magistrate acting under section 347, has made up his mind to commit, he should be careful not to prejudice the accused by depriving him of the opportunities provided by section 208 and section 212, Criminal Procedure Code, of offering defence evidence; and always provided that the requirements of sections 208, 211 and 212, Criminal Procedure Code, as well as the formalities required by section 213, Criminal Procedure Code, are carefully observed, there is no reason why a Magistrate should be required to take proceedings *de novo* under Chapter XVIII, Criminal Procedure Code.

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Turning now to the second question regarding the applicability in these circumstances of section 288 of the Criminal Procedure Code, the section lays down that "the evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872." In this connection we find ourselves in complete agreement with the observation of their Lordships in *Abdul Gani Bhuya v. Emperor* (1) which exactly covers the point now in issue. A suggestion has been made that because this section specifically mentions Chapter XVIII, it should follow that the statement of a witness recorded under Chapter XXI cannot be so transferred. In our opinion, however, the mere mention of Chapter XVIII does not imply that the provisions of Chapter XVIII must in order to attract the provisions of section 288, Criminal Procedure Code, have been followed in their entirety. Chapter XVIII relates to the enquiry preliminary to commitment, and provided the necessary preliminaries prior to commitment as detailed above have been taken by the Magistrate who decides to commit under section 347, Criminal Procedure Code, we are of opinion that the evidence must be regarded as duly recorded in the presence of the accused in the "enquiry prior to commitment" that is, under Chapter XVIII. In other words we are of opinion that provided a Magistrate, in acting under section 347, Criminal Procedure Code, commits the accused subject to the safeguards relating to the rights of the accused discussed above, any statement recorded by the

(1 I. L. R. (1926) 53 Cal. 181.

Magistrate in the presence of the accused prior to the commitment would be the evidence of a witness duly recorded under Chapter XVIII, and may, therefore, be transferred and treated as substantive evidence in the trial before the Sessions Court.

As regards the question of prejudice in the present case, we are satisfied that there could be no prejudice to the accused by the transfer of the statements in question. The accused was duly informed that the Magistrate had decided to commit him to Sessions and was given every opportunity to produce his defence both before and after this decision. The witnesses were re-called, offered for cross-examination and the only defence witness named by the accused appears to have been examined by the Magistrate. In these circumstances there can be no question of prejudice.

With these observations we return the records to the Sessions Judge, with the order that we decline to quash the commitment proceedings and that the proceedings so far taken must stand; and we direct the Sessions Judge to proceed with the trial of the case in accordance with law

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