CRIMINAL REVISION.

Before Mr. Justice Shah and Mr. Justice Crump.

1920.

August 24.

EMPEROR *v.* G. S. FERNANDEZ*.

Criminal Procedure Code (Act V 1898), section 342—Power to examine accused—Summons case—Practice and procedure.

Under section 342 of the Criminal Procedure Code, 1898, a Magistrate is bound in a summons case to examine the accused before convicting him.

THIS was an application to revise conviction and sentence passed by Chunilal H. Setalvad, Second Presidency Magistrate of Bombay.

The accused was a supervisor in the Indian Munitions Board Cotton Depot in Bombay and the complainant was a tally clerk working under him.

The complainant lodged a complaint against the accused for an offence punishable under section 352 of the Indian Penal Code.

The trying Magistrate heard the evidence led on both sides, but without examining the accused as required by section 342 of the Criminal Procedure Code, 1898, convicted and sentenced him.

The accused applied to the High Court on the ground among others that the Magistrate should have questioned the accused as required by section 342 of the Criminal Procedure Code.

The Court granted a rule on the 4th August 1920, delivering the following judgment.

PER CURIAM :—One of the points taken in this application is that after the prosecution evidence was recorded the accused was not asked any questions to enable him to explain the evidence against him as

* Criminal Revision No. 134 of 1920.

required by section 342 of the Code of Criminal Procedure. The record does not disclose any such examination, and before dealing with the case, we think, we ought to have a report from the trial Magistrate as to whether the accused was asked any questions as required by that section, after the prosecution evidence was over. The record may be sent to the trial Magistrate in order to enable him to report to us on this question. The case may be brought on next week after the report is received.

The Magistrate, in submitting the report on the 7th August, said :—

"I have now no recollection of the case except that contained in my record from which I perceive I could not have asked the accused any questions as required by section 342, Criminal Procedure Code. He was asked at the commencement under section 242 whether he had any cause to show why he should not be convicted and his answer was recorded."

Four days later, the Magistrate submitted a further report in the course of which he remarked :—

"As far as I am aware the practice of all the Presidency Magistrates' Courts in Bombay is that in the trial of cases under Chapter XX, Criminal Procedure Code (Trial of Summons Cases) an accused is *not* examined under section 342, Criminal Procedure Code."

The rule was heard.

Binning, with *A. G. Desai*, for the accused.

S. S. Patkar, Government Pleader, for the Crown.

SHAH, J. :—In this application it has been urged on behalf of the applicant that after the witnesses for the prosecution were examined, the accused was not asked to explain the evidence against him as required by section 342 of the Code of Criminal Procedure. The offence charged was punishable under section 352, Indian Penal Code, and the procedure applicable to the case was that provided for the trial of summons-

1920.

EMPEROR v. FERNANDEZ.

cases. The trial was held by the Second Presidency Magistrate. On behalf of the Crown it is urged that the words of section 342 are controlled by the words "if the Magistrate think fit" used in section 245 and "if any" in section 370, clause (*f*) of the Code and that the Magistrate was not bound to question the accused as required by section 342 in the trial of a summons-case before convicting the accused.

We called for a report from the learned Magistrate as to whether the accused was in fact questioned at the close of the prosecution case under section 342. We have received a report on that point and the learned Magistrate has also submitted a supplementary report as to the practice followed in such cases by the Presidency Magistrates and as to the grounds upon which the practice is based.

In view of the report and the record of the case it may be taken as a fact that the accused was not asked any question after the prosecution witnesses were examined as required by section 342 of the Code. We have, therefore, to consider whether it was obligatory upon the trial Magistrate in this case to question the accused generally and if so what is the effect of the omission upon the present case.

These questions must be considered with reference to the provisions of the Code, and it is clear that we cannot allow considerations of convenience and practice to control the plain meaning of the words used in a Statute. If the interpretation involves any inconvenience or departure from any practice which may be found to be suited to any class of cases, it would be for the Legislature to consider the matter.

The words of section 342 are clear. The material words are these: "For the purpose of enabling the accused to explain any circumstances appearing in the

1920.

EMPEROR v. FERNANDEZ.

evidence against him the Court...shall...question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." The section occurs in the Chapter relating to general provisions as to inquiries and trials: and there can be no doubt and it is not disputed that it applies to the Presidency Magistrates as much as to other Courts. The purpose of the provision is clear and a general provision of this character applicable to all Courts and to all inquiries and trials under the Code ought to be given effect to unless there are clear words to render it inapplicable to any particular case or class of cases.

The provisions mainly relied upon by the Government pleader as limiting the operation of these words are to be found in the Chapter relating to the trial of summons-cases. It is urged that the provisions of that Chapter leave it to the discretion of the Magistrate to question the accused after the witnesses for the prosecution are examined. Sections 242 and 245 are relied upon as having that effect. It seems to me that when the provisions are examined carefully, they do not involve any such limitation. Section 242 requires that the accused shall be questioned at the beginning on the particulars of the offence, of which he is accused and that it shall not be necessary to frame a formal charge. Section 244 provides that if the accused does not admit that he has committed the offence, the Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution and also to hear the accused and take such evidence he produces in his defence. Section 245 provides that upon taking the evidence referred to in section 244, and such further evidence (if any) as the Magistrate may of his own motion cause to be produced and (if he thinks fit) examining the accused,

1920.

EMPEROR v. FERNANDEZ.

the Magistrate may acquit or convict the accused. It is clear that section 244 requires the Magistrate to hear the accused and to record the evidence which he adduces in his defence after the prosecution evidence is recorded. This is quite consistent with the provisions of section 342, and does not suggest any inference against the application of the provisions of section 342 to the trial of summons-cases. Section 245 contains the words "if he thinks fit"; but having due regard to the context, it appears to me that the words are used with reference to the further examination of the accused, which may become necessary or desirable in virtue of the evidence which the Court may call of its own motion. When we have a general provision as to the necessity of questioning an accused person to enable him to explain the evidence against him after the witnesses for the prosecution are examined, the other provisions in the Code should be read as far as possible so as to avoid an inconsistency. A particular provision may control or limit a general provision but the intention to limit the operation of the general provision must be clear. The words "if he thinks fit" do not, in my opinion, control or modify the provisions of section 342, but are capable of being read—and should be read—as serving a sufficient purpose, consistently with the provisions of section 342. The suggestion made by Mr. Binning that the words "if he thinks fit" are used in section 245, as it may not be necessary for the Magistrate to examine the accused if he is to be acquitted may afford a further explanation of the use of the words without indicating any limitation upon the provisions of section 342. On a consideration of the provisions of this Chapter, I am unable to hold that the Magistrates are relieved in the trial of summons-cases from the obligation of questioning the accused generally under section 342 to enable

him to explain the evidence against him after the witnesses for the prosecution are examined.

The provisions of section 370, clause (*f*) do not suggest any inference to the contrary. The words "if any" do not in any sense control the words of section 342. It has been held by this Court, and it is conceded in the argument, that in spite of these words it is obligatory upon the Presidency Magistrate to examine an accused person under section 342 in the trial of warrant cases. The words "if any" are used in section 289 of the Code; and in spite of these words the relaxation of the rule contained in section 342 is not allowed in the trials by Sessions Courts: see *Emperor* v. *Savalya*[1]; *Emperor* v. *Raju Ahilaji*[2]; and *Emperor* v. *Basapa Ningapa*[3]. The purpose of section 370 is to state the particulars to be recorded by the Presidency Magistrate instead of a judgment as provided in section 367 and not to lay down whether an accused person shall be questioned or not in a particular case or class of cases. I do not think that the words "if any" used in clause (*f*) of that section can be properly used as modifying the provisions of section 342 as regards the Presidency Magistrates. If that construction were adopted section 342 could be rendered nugatory even in the trial of warrant cases by Magistrates and trials by Sessions Courts as the same words are used in sections 253 and 289 of the Code. It seems to me that the weakness of the argument urged on behalf of the Crown is indicated by the circumstance that without a laboured attempt to control or limit the plain meaning of the words of a section applicable to all trials and inquiries by reference to provisions in different chapters relating to different purposes, the result contended for by the prosecution cannot be reached.

(1) (1907) 9 Bom. L. R. 356. (2) (1907) 9 Bom. L. R. 730.
(3) (1915) 17 Bom. L. R. 892.

1920.

EMPEROR v. FERNANDEZ.

I should say that if the Legislature intended to limit the application of section 342 in the sense suggested by the Crown there would have been clear words to that effect in the section itself. In the Chapter relating to general provisions as to inquiries and trials there are some sections of limited application and the words indicating the limitations are to be found in such sections.

I may mention that I have referred to the different provisions relating to the examination of the accused in the earlier Codes of 1861, 1872 and 1882, and in the Presidency Magistrates Act (IV of 1877). The scheme of the existing provisions as to the examination of the accused was adopted in the Code of 1882. I do not think that it will serve any useful purpose to examine them in detail: it is sufficient to say that I have not been able to find any indication therein to favour the contrary view. I am, therefore, satisfied that the accused should have been examined in this case as required by section 342.

The question relating to the manner in which such examination is to be recorded under section 364 stands on a different footing. On that point I do not find any special provision regarding the Presidency Magistrates except that contained in section 364, sub-section (3). As regards the recording of evidence, section 362 makes a special and specific provision for the Presidency Magistrates. It is not without significance that in section 364, which is to be found in the same Chapter, no similar differentiation is made as regards the manner of recording the examination of an accused person by the Presidency Magistrates. In the present case, however, the point is not whether the examination of the accused was properly recorded or not but whether the accused was questioned at all after the witnesses for the prosecution were examined.

The omission to examine the accused as required by section 342 cannot be condoned. Having regard to the nature of the offence and the facts of the case, I do not think that it is necessary in the interest of justice to order a re-trial. I would, therefore, set aside the conviction and sentence and direct the fine, if paid, to be refunded.

CRUMP, J. :—The question which arises for decision at the outset in this case is whether a Presidency Magistrate trying an accused person for an offence punishable under section 352 of the Indian Penal Code is bound, before convicting, to examine the accused person in the manner prescribed by section 342 of the Code of Criminal Procedure.

The procedure to be followed by Presidency Magistrates differs from the procedure to be followed by other Magistrates only in those particulars which are specifically laid down in the Code of Criminal Procedure and in this respect the relevant sections are sections 362 and 370 which prescribe the manner in which the evidence and the judgment respectively shall be recorded. These two sections form exceptions to the provisions of Chapters XXV and XXVI which deal with the mode of recording evidence in enquiries and trials, and with the judgment. *Prima facie* nothing in these Chapters has any bearing on section 342 which belongs to Chapter XXIV which contains general provisions as to enquiries and trials. The words of section 370 (*f*) "the plea of the accused and his examination (if any)" do not in reality affect the present question for it cannot be doubted that there are cases other than those in which an accused person is convicted where it is unnecessary to record his examination under section 342. If for instance there is an acquittal under section 247 or 248 or a discharge under section 253

1920.

EMPEROR v. FERNANDEZ.

there may be no occasion for the examination prescribed by section 342. That this is so is plain if it is remembered that the examination of the accused under that section is obligatory only for the purpose of enabling him to explain any circumstance appearing in evidence against him. If there is nothing to explain there is no necessity for the examination. *Cessante legis ratione cessat et ipsa lex.*

There is, therefore, nothing in the special procedure provided for Courts of Presidency Magistrates which for the purposes of the present question needs to be taken into account. With the exception of the two particulars noted in the preceding paragraph the procedure for the trial of summons-cases and warrant cases is applicable in those Courts.

The present case was a summons-case, and the question may, therefore, be generally stated thus: "Is a Magistrate before convicting an accused person of an offence triable as a summons-case bound to examine him as required by section 342?"

The mandatory portion of section 342 may be set out as follows:—"For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him the Court...shall...question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence." This is one of the general provisions as to inquiries and trials as stated in the title of Chapter XXIV of which it forms part. It has been held by this Court that it applies to trials before a Court of Session in spite of the word "if any" in section 289: *Emperor* v. *Raju Ahilaji*[1] and *Emperor* v. *Savalya*[2]. It has also been held by this Court that a Presidency

[1] (1907) 9 Bom. L. R. 730. [2] (1907) 9 Bom. L. R. 356.

Magistrate cannot convict an accused of an offence triable as a warrant case without recording his examination under this section : *Emperor* v. *Harischandra*[1]. So far as I am aware the point has not hitherto been decided with reference to summons-cases.

Prima facie section 342 is of general application and is based on the salutary principle that an accused person should have an opportunity of furnishing an explanation before he is convicted. The Legislature has not specifically excepted cases triable under Chapter XX (summons-cases) from its operation, and the general principle on which it is based applies to those cases as strongly as to any other cases. But it has been urged that the language used in that Chapter excludes the applicability of section 342. Reliance is placed on the words " (if he thinks fit) ", in section 245 (1). It has been held, as I have already stated, that similar words in section 289 do not have the effect contended for. It is significant that these words occur in para (1) of the section which deals with acquittals. We are not now concerned with cases of acquittals. As I have already pointed out there may be cases in which the Court finds nothing for the accused to explain, and in such cases it may have a discretion not to examine the accused. But I am unable to infer from these words that where the Court finds that damnatory circumstances appear in the evidence against the accused, there is any discretion in the matter. It is to be remarked that section 244 (1) makes it obligatory on the Magistrate to " hear the accused after the evidence for the prosecution is recorded " and I find it difficult to hold that had the Legislature intended to exclude the applicability of section 342 they would not have done so in plain terms.

(1) (1907) 10 Bom. L. R. 201.

1920.

EMPEROR v. FERNANDEZ.

The scope of section 342 has been the subject of discussion in a recent case before the Patna High Court: *Raghu Bhumij* v. *The King-Emperor*[1]. The point there was as regards Sessions trials, but it appears that Sultan Ahmed J. was inclined to hold that section 342 did not apply to the trial of summons-cases. The remarks upon this point are of course *obiter*. The distinction suggested, however, is that the words "before he is called on for his defence" occurring in section 342 are found in section 256 which deals with warrant cases, and in section 289 which deals with Sessions trials, but do not appear in Chapter XX which prescribes the procedure for the trial of summons-cases. With all deference I am constrained to say that the argument depends upon matters of form rather than of substance. To call upon an accused person to enter upon his defence is a necessary incident of every trial. Though that precise form of words is not used, the thing itself is indicated with sufficient clearness in section 244. A Magistrate trying a summons-case must necessarily under that section ask the accused what he has to say, and if he wishes to examine any witnesses, and when a Magistrate does this he does in substance call upon the accused to enter upon his defence.

After giving the matter my best consideration I find no substantial reason to doubt that section 342 is applicable to the trial of summons-cases to the extent which I have endeavoured to indicate. The omission to comply with the section must necessarily attract the same consequence in these as in other trials, and it follows, I think, that the illegality vitiates the proceedings.

It is not necessary to pronounce upon the merits, but in view of the trivial nature of the offence, and the circumstances as a whole no useful purpose would be

[1] (1920) 5 P. L. J. 430.

served by a re-trial. I would set aside the conviction and sentence and direct the fine, if paid, to be refunded.

1920.

EMPEROR v. FERNANDEZ.

Conviction and sentence set aside.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

SAKHARAM DAJI GANPULE (ORIGINAL PLAINTIFF), APPELLANT *v.* GANU RAGHU GURAV AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS[*].

1920. *August* 26.

Civil Procedure Code (Act V of 1908), sections 9, 92—Offerings made by devotees at a temple—Suit by pujaris to recover offerings from gurays of the temple—Suit of civil nature—Suit under the purview of section 92.

A suit by the hereditary *pujari* of a temple to recover from the *gurays* (temple servants) offerings placed by devotees before the idol, is a suit of civil nature within the meaning of section 9 of the Civil Procedure Code, 1908.

Such a suit, however, falls within the purview of section 92 of the Code of Civil Procedure, where the temple is under the management of the Devasthan Committee and the funds of the temple including the offerings to the deity are administered under a scheme by the members of that Committee.

Per SHAH, J.:—The principle adopted is apparently that the scheme once settled by a Court cannot be altered except by the Court. This would seem to preclude suits between parties to establish a private right, which, if established, would interfere with a charitable scheme settled by the Court.

Ramadas v. *Hanumanta Rao*[1], referred to.

SECOND appeal from the decision of D. A. Idgunji, Assistant Judge of Ratnagiri, confirming the decree passed by H. N. Mehta, Subordinate Judge at Chiplun.

The plaintiff was one of the hereditary *pujaris* of the temple of Shri Bhargawa Ram near Chiplun. The pujarishipat the temple was confined to the family of Ganpules, of whom the plaintiff was one. The right of performing *puja* (worship) at the temple was enjoyed by the members of the Ganpule family by turns.

[*] Second Appeal No. 864 of 1919.

(1) (1911) 36 Mad. 364.