1902
FEB. 5

CRIMINAL REVISION.

29 C. 481.

29 C. 481.

[481] *Before Mr. Justice Prinsep and Mr. Justice Stephen.*

HOSEIN SARDAR *v.* KALU SARDAR.* [5th February, 1902.]

Accused—Offence triable as a warrant case—Conviction of offence triable as a summons case—Absence of charge—Conviction, legality of—Material error—Criminal Procedure Code (Act V of 1898) ss. 232, 242 and 254—Penal Code (Act XLV of 1860) ss. 143 and 379.

When a case is being tried as a warrant case, and a charge is drawn up of an offence which is triable as a warrant case, and it is intended to proceed against the accused also for an offence which is triable only as a summons case, that offence should form part of the charge.

Where an accused person was summoned for offences under ss. 143 and 379 of the Penal Code and the trying Magistrate drew up a charge only for the offence under s. 379, but convicted the accused only for the offence under s. 143 of the Code:

Held, that the offence under s. 143 should have formed part of the charge, and that the accused was misled in his defence by the absence of such a charge.

THE petitioner Hossein Sardar obtained a Rule calling upon the District Magistrate to show cause why his conviction under s. 143 of the Penal Code should not be set aside on the ground that no charge having been framed under s. 143, and the only charge being under s. 379 of the Penal Code, the conviction was bad in law.

In this case the petitioner was summoned by the Deputy Magistrate of Magurah for offences under ss. 143 and 379 of the Penal Code. At the trial the Deputy Magistrate drew up a charge only for the offence under s. 379. The petitioner was, however, on the 20th September 1901, convicted only of the offence under s. 143.

Mr. *P. M. Guha* for the petitioner.

PRINSEP AND STEPHEN, JJ. In this case the accused was summoned for offences under ss. 143 and 379 of the Penal Code. A charge was, however, drawn up only for the offence [482] under s. 379, but, nevertheless, the petitioner has been convicted only of an offence under s. 143. A Rule has been granted to consider whether, no charge having been framed under s. 143 and the only charge being under s. 379, the conviction and sentence are not bad. The Magistrate in his explanation attempts to support his order on the ground that an offence under s. 143 being triable as a summons case, no charge was necessary. But we think that when a case is being tried as a warrant case and a charge is drawn of an offence, which is triable as a warrant case, if it is intended to proceed against the accused also for an offence which is triable only as a summons case, that offence should form part of the charge. The case of the accused, however, is that no charge has been drawn of the offence of which he has been convicted. We are called upon to consider in the terms of s. 232 of the Code of Criminal Procedure whether, by the absence of such a charge, the accused was misled in his defence. There is every reason to believe that he has been so misled. He was summoned to appear to stand his trial for two offences, and when he was charged only with one of those offences, he would have good reason to suppose that the other offence had been dropped by the Magistrate. In the next place, his examination shows that he was required only to offer an

* Criminal Revision No. 948 of 1901, made against the orders passed by R. Bannerjee, Esq., Deputy Magistrate of Magurah, dated the 20th of September 1901.

explanation regarding the offence under s. 379. Under such circumstances we think that he was misled in his defence by the error of the Magistrate. We are informed that the petitioner has already undergone a considerable part of the sentence passed on him. Under such circumstances we think that no further proceedings should be taken. The conviction and sentence are set aside.

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Rule made absolute.

29 C. 483.

[483] CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice Stephen.

EMPEROR v. NURI SHEIKH.* [31st January, 1902.]

Witnesses, statements of—Police investigation—Power of Magistrate to record statements not voluntarily made—Duty of police when fear of witnesses being gained over—Magistrates, Bench of—Powers of member to act independently—Murder—Suspicion—Criminal Procedure Code (Act V of 1898) ss. 15, 16, 162, 164, and 307—Penal Code (Act XLV of 1860) s. 302.

The accused was suspected of having killed his wife. The police officer investigating the case sent him to the Sub-divisional Magistrate, who, considering the case as one of suspicion only, released the accused on bail. After the *post-mortem* the investigation was renewed, and three days after the release of the accused the police officer sent a number of witnesses to an Honorary Magistrate, not having jurisdiction to try the case, to have their statements recorded under s. 164 of the Criminal Procedure Code on the ground that there was every chance of their being gained over. Their statements, as also that of the accused, were recorded by that Magistrate.

Held, that the police officer had no authority to place the witnesses before the Honorary Magistrate, as they did not appear voluntarily.

Held, also, that the Honorary Magistrate, being a member of an independent Bench exercising third-class powers could not, unless he was specially authorized, act independently, that is to say, when not sitting on the Bench.

Held, further, that the object of s. 162 of the Criminal Procedure Code would be defeated if, while a police officer cannot himself record any statement made to him by a person under examination, he can do so by causing the persons to appear before a local Magistrate not competent to deal with the case and to get their statements recorded by him. If the police officer had reasons to believe that the witnesses were likely to be gained over by the accused or his party, the police officer should have sent in the accused and the witnesses to the Magistrate having jurisdiction without delay.

IN this case the accused Nuri Sheikh and his younger wife, the deceased Safina Bibi, slept alone in his *bari* on the night of the 16th August 1901.

The next morning the villagers became aware that she was dead. Suspicion was aroused, and the chaukidar gave informa-
[484] tion at the police-station. Shortly afterwards the Sub-Inspector arrived, and after having examined a number of witnesses sent the accused to the Sub-divisional Magistrate at Jamalpore, who on the 19th August released the accused on bail, there being in his opinion nothing but mere suspicion against him. At the *post-mortem* examination of the body, it was found that the deceased woman had died from strangulation. The police then renewed the investigation, and on the 22nd August the Sub-Inspector sent seven witnesses to a local Honorary Magistrate not having jurisdiction for examination under s 164 of the Criminal Proce-

* Criminal Reference No. 39 of 1901, made by B. V. Nicholl, Esq., Sessions Judge of Mymensingh, dated the 17th of December 1901.