Before Mr. Justice Prinsep and Mr. Justice Stephen.

HOSSEIN SARDAR
v.
KALU SARDAR.*

1902
Feb. 5

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

* *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.

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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 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.

D. S. *Rule made absolute.*