REVISIONAL CRIMINAL

Before R. P. Khosla and J. N. Kaushal, JJ.

BANTA SINGH AND ANOTHER,—*Petitioners*

versus

GURBUX SINGH,—*Respondent.*

Criminal Revision No. 1162 of 1965

October 27, 1966.

Code of Criminal Procedure (Act V of 1898)—Ss. 247 and 259—Complaint filed in respect of offences some of which can be tried as summons-cases and others as warrant-cases—Accused summoned in respect of both kinds of offences—Trial started as for warrant cases—Charge framed for offence triable as summons-case—Complainant absent but accused present at a subsequent hearing—Order dismissing the complaint in default of appearance of the complainant—Whether legal.

Held, that the Code of Criminal Procedure has laid down different procedures for the trial of summons-cases and warrant-cases but there is no provision as to which procedure should be observed when the complaint before the magistrate discloses 'summons-cases' as well as 'warrant-cases'. In such a case the proper course for the magistrate is to observe the procedure for the trial of 'warrant-cases' for the reason that the procedure with regard to the trial of graver charge should be followed in preference to the more summary procedure appropriate to less serious offences.

Held, that once the trial is rightly started as the trial of a warrant-case, there is no provision in the Code under which at a later stage the procedure can be changed to the one prescribed for trial of a summons-case. It is absolutely immaterial that the charge which is framed may relate to an offence triable as a summons-case. If the change of procedure is permitted, in most of the cases, it may act to the prejudice of the accused inasmuch as he may lose the right of double cross-examination.

Held, that in the present case the Magistrate had summoned the accused to stand their trial under sections 448, 427 and 504, Indian Penal Code. The offences under the latter two sections, namely, 427 and 504, are triable as warrant cases being punishable with imprisonment for two years. The Magistrate was, therefore, justified in conducting the trial as a warrant-case trial. A charge was framed under section 448 and the prosecution witnesses were further cross-examined by the accused. On the day fixed for recording the statements of the accused, the Magistrate obviously could not resort to the provisions of section 247 of the Code of Criminal Procedure if the complainant was not

present. After the charge has been framed, even section 259 of the Code of Criminal Procedure is not applicable. The Magistrate, therefore, acted illegally when he dismissed the complaint for the default of appearance of the complainant.

Case referred by the Hon'ble Mr. Justice J. N. Kaushal on 9th August, 1966 *to the larger bench for decision of a law point involved in the case, and the case was finally decided by the Division Bench consisting of the Hon'ble Mr. Justice R. P. Khosla and the Hon'ble Mr. Justice J. N. Kaushal on 27th October,* 1966.

Petition under sections 435/439, *Code of Criminal Procedure, for revision of the order of Shri H. K. Mehta, Additional Sessions Judge, Amritsar, dated the 2nd November,* 1965, *reversing that of Shri P. S. Sharma, Magistrate, 1st Class, Amritsar, dated 27th March,* 1965, *accepting the revision petition and sending the file to the court of Shri T. N. Gupta, Magistrate, 1st Class, Amritsar, for disposal of the case, and further directing the parties to appear in that court on 12th November,* 1965.

BHAGAT SINGH CHAWLA, ADVOCATE, for the Petitioners.

KULDIP SINGH, ADVOCATE, for the Respondent.

JUDGMENT OF DIVISION BENCH

KAUSHAL, J.—This revision petition was referred by me to a larger Bench because of conflict of judicial decisions and also because I thought that the view of Bhandari, C.J., in *Daulat Ram* v. *Ram Kishan and others* (1) required re-examination.

The facts are that Gurbux Singh, respondent filed a complaint under sections 448, 506, 504, 379 and 427, Indian Penal Code, against Banta Singh and Pal Singh alias Kirpal Singh and Chanan Singh. After recording preliminary evidence, the Magistrate summoned the accused to stand their trial under sections 448, 427 and 504, Indian Penal Code. Chanan Singh, accused after appearing in Court absented himself and proceedings had to be taken against him under section 512 of the Code of Criminal Procedure. On 14th December, 1964, after recording the evidence examined on behalf of the complainant the Magistrate framed a charge under section 448, Indian Penal Code, against Banta Singh and Pal Singh. After the charge, the prosecution witnesses were further cross-examined by the accused and the case was adjourned to 27th March, 1965. On that

(1) A.I.R. 1958 Punj. 317.

day, the statements of the accused had to be recorded under section 342, Code of Criminal Procedure. The complainant was, however, absent on that day and the accused were present. The Magistrate passed the following order :—

> "The complainant is not present. It seems that he does not want to pursue the case. Therefore, the complaint is dismissed in default of presence."

Gurbux Singh, complainant was dissatisfied with this order and filed a revision petition which came for hearing before the Additional Sessions Judge, Amritsar. The learned Judge held that the impugned order which was passed by the Magistrate was illegal and bad in the eye of law. In his opinion, after the charge had been framed, the Magistrate could not dismiss the case for default of appearance of the complainant. He characterised the order of dismissal as unknown to the Code of Criminal Procedure. The revision petition was accepted and the order passed by the learned Magistrate was set aside and the case was sent back to the Court of the Magistrate for disposal according to law. Banta Singh and Pal Singh, accused have come to this Court in revision against the order passed by the Additional Sessions Judge, Amritsar.

According to Mr. Bhagat Singh Chawla, the learned counsel for the petitioners, the order which was passed by the Magistrate on 27th March, 1965, was an order of acquittal and should be deemed to have been passed under section 247 of the Code of Criminal Procedure. The learned counsel maintains that offence under section 448 of the Indian Penal Code, under which a charge had been framed against the petitioners, was triable as a summons-case and although the Magistrate had tried the case as a warrant-case, the benefit of section 247 of the Code of Criminal Procedure could not be denied to the petitioners. Reliance for this contention was placed on *Venkatarama Iyer* v. *Sundaram Pillai and others* (2). *Daulat Ram* v. *Ram Kishan and others* (1), *and Bodu Ram* v. *Uda Ram and others* (3). There is no doubt that these three Single Bench decisions support the contention of Mr. Chawla. A learned Single Judge of the Madhya Bharat High Court in *Ratanlal Jagannath* v. *Halku Deochand* and *another* (4) *has taken a contrary view.*

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(2) A.I.R. 1923 Mad. 439.

(3) I.L.R. (1963) 13 Raj. 632.

(4) A.I.R. 1954 M.B. 2.

After hearing the learned counsel at length and examining the authorities cited and the various provisions of the Code of Criminal Procedure, we are of opinion that the view of law taken by the Madhya Bharat High Court seems to be correct.

The Code of Criminal Procedure has laid down different procedures for the trial of summon-cases and warrant-cases. The procedure for the trial of summon-cases is contained in Chapter XX and that of warrant-cases in Chapter XXI. According to section 4(1) (v) and (w), 'summons-case' means a case relating to an offence and not being a warrant-case; and 'warrant-case' means a case relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding one year. This section does not speak of summons offences and warrant offences, but of summons-cases and warrant-cases. Where the Code deals with offences, it divides them into 'cognizable' and 'non-cognizable', but where it is dealing with procedure, then it speaks not of offence but of cases. Although the Code, as observed earlier, has laid down the procedure separately for the trial of summon-cases and 'warrant-cases', there is no provision as to which procedure should be observed when the complaint before the Magistrate discloses 'summons-cases' as well as 'warrant-cases'. Under these circumstances, the proper course for the Magistrate is to observe the procedure for the trial of 'warrant-cases'. The reasons seems to be obvious. The procedure with regard to the trial for the graver charge should be followed in preference to the more summary procedure appropriate to less serious offences. There is no dispute so far as this proposition is concerned and the learned counsel on both sides are agreed on this. There is considerable judicial authority also in support of this view. See *Rajnarain Koonwar* v. *Lala Tamoli Raut* (5). *Raghuwala Naicker* v. *Singaram and another* (6), *Kanji Vijpal* v. *Pandurang Keshav Rana* (7). *Swaroop Singh* v. *Emperor* (8) *and Mappillaisami Thevar and others* v. *Muthuswami Iyer* (9).

Once the trial is rightly started as the trial of a warrant-case, there is no provision in the Code under which at a later stage the

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(5) I.L.R. 11 Cal. 91.
(6) A.I.R. 1918 Mad. 371.
(7) A.I.R. 1940 Bom. 413.
(8) A.I.R. 1948 All. 135.
(9) A.I.R. 1949 Mad. 76.

procedure can be changed to the one prescribed for trial of a summons-case. It is absolutely immaterial that the charge which is framed may relate to an offence triable as a summons-case. If the change of procedure is permitted, in most of the cases, it may act to the prejudice of the accused inasmuch as he may lose the right of double cross-examination. This being the position of law, the various cases cited on both sides may now be examined.

The earliest case relied upon by Mr. Chawla is decided by Wallace, J., in *Venkatarama Iyer's case*. The relevant para in the judgment reads as follows :—

> "No doubt section 247 appears in the Chapter headed 'Of the trial of summons-cases' and not in the Chapter headed 'Of the trial of warrant-cases', but in my opinion that does not settle the point at issue. Section 247 seems to me intended to lay down a general principle that a person charged with a summons-case offence is entitled in law to an acquittal if the complainant is absent ; and I cannot see why this right should be denied to him simply because the Magistrate has adopted a particular procedure in the trial of the case. *Ex hypothesi* in such contingency, the complainant has so exaggerated his case that the Magistrate had to try it as a warrant-case, whereas, if the complainant had not exaggerated it, and the Magistrate had tried it as a summons case *ab initio*, the acquittal on the ground of complainant's absence could have been perfectly legal. I cannot see any justification either in law or in reason why accused should lose this right to demand an acquittal merely because the complainant exaggerated the case against him. To hold otherwise would be to allow a pure technicality to negative a substantial legal right. If any conflict arises between technicalities and the legal rights of an accused person, undoubtedly the later must prevail."

With respect, the learned Judge is not right when he says that section 247 seems to lay down a general principle that a person charged with a summons case offence is entitled in law to an acquittal if the complainant is absent. Section 247 is contained in Chapter XX which deals with the trial of summon-cases. This section is, therefore, available only to those accused against whom trial is being held under this Chapter. If trial is held according to the provisions contained in Chapter XXI, that is 'Of the trial of

warrant-cases, section 247, obviously becomes inapplicable. It is again not correct to say that the trial is held by the Magistrate as a warrant case only because the complainant has exaggerated his case. Before proceeding to trial the Magistrate applies his mind and comes to a *prima facie* conclusion that the trial of a graver offence, namely, under procedure 'of trial of warrant-cases' is called for. It is the satisfaction of the Magistrate which results in the trial either as the trial of a summons-case or of a warrant-case. Wallace, J., was alive to this situation when he said that a pure technicality could not be allowed to negative a substantial legal right. The legal right does not flow to the accused on any general principle as assumed by the learned Judge, but under section 247 of the Code of Criminal Procedure only. As observed in the earlier part of this judgment, once the trial is commenced rightly as the trial of a warrant-case, it is not permissible for a Magistrate to invoke the provisions of section 247 of the Code of Criminal Procedure, if the complainant is absent. This section is available only if the trial is held under Chapter XX of the Code of Criminal Procedure.

In Daulat Ram's case, decided by Bhandari, C.J., no fresh reasons were given in support of the judgment and reliance was mainly placed on the decision of Wallace, J., in *Venkatarama Iyer's case.* The view of Bhargava, J., in *Bodu Ram's case* is based on the two decisions of the Madras and Punjab High Courts, quoted above, and needs no further examination.

The view of Shinde, J., in *Ratanlal Jagannath's case* is based on two Allahabad cases reported as *Ganga Saran* v. *Emperor* (10), and *Govind* v. *Emperor* (11). A decision of the Madras High Court in *Public Prosecutor* v. *Thawasalandi Thevan* (12) was also relied upon by the learned Judge. The relevant observations made by him are in these words :—

> "This view is based mainly on the ground that when a case starts as a warrant-case the accused may reserve his right of cross-examination and hence if the procedure is changed, he may lose his right of cross-examination. If, therefore, it is necessary in the interest of the accused to stick to the procedure of warrant-cases, when it is once started,

(10) A.I.R. 1921 All. 282.
(11) A.I.R. 1927 All. 270.
(12) 4 Ind. Cases 1039.

it is not fair to change it simply because the accused derives benefit of section 247 thereby."

In the present case, the Magistrate had summoned the accused to stand their trial under sections 448, 427 and 504, Indian Penal Code. The offences under the latter two sections, namely, 427 and 504, are triable as warrant cases being punishable with imprisonment for two years. The Magistrate was, therefore, justified in conducting the trial as a warrant-case trial. A charge was framed under section 448 and the prosecution witnesses were further cross-examined by the accused. On the day fixed for recording the statements of the accused, the Magistrate, obviously could not resort to the provisions of section 247 of the Code of Criminal Procedure if the complainant was not present. After the charge has been framed, even section 259 of the Code of Criminal Procedure is not applicable. The Magistrate, therefore, acted illegally when he dismissed the complaint for the default of appearance of the complainant. A learned Single Judge of this Court (Shamsher Bahadur, J.) in *Nidhan Singh* v. *Kaur Singh and others* (13) has observed :—

"In view of the proviso added to section 247 of the Code by Act 26 of 1955, even in summons cases, the Magistrate can proceed with the case on complainant's failure to attend when he considers that complainant's personal attendance is not necessary. In the stage which the case had reached, it was the duty of the Magistrate to have proceeded with the case despite the absence of the complainant when the entire evidence of the prosecution had been recorded and the evidence on behalf of the accused alone remained to be taken."

In this case, charge had been framed against the accused and further cross-examination of the prosecution witnesses had also been recorded.

While considering sections 253 and 259 of the Code of Criminal Procedure, Allsop, J., in *Chiranji Lal* v. *Ram Swarup* (14), observed—

".....but once the charge has been framed or if the case is non-compoundable and cognizable, an order dismissing the

(13) 1964 P.L.R. 295.
(14) A.I.R. 1943 All. 9.

complaint for non-appearance of the complainant is wrong as it is the duty of the Magistrate in the interest of the general public to see whether an offence has been committed and to punish it if he thinks that the accused is guilty."

Similar observations were made in *Emperor* v. *Nazo alias Ali Nawaz* (15), which read as follows :—

"The acquittal of the accused under section 259 after the charge has been framed on the ground of the complainant's absence is wrong because section 259 does not provide for an acquittal of an accused person in the absence of the complainant but for his discharge, and such order of discharge can only be made at a time before a charge in the case has been framed. When the charge has been framed, the absence of the complainant can have no effect and the Magistrate is bound to proceed to dispose of the case on its merits."

Due to all reasons stated above, it is held that the learned Magistrate had no jurisdiction to pass the impugned order. This revision petition, therefore, fails and is dismissed.

R. P. KHOSLA, J.—I agree.

B.R.T.

CIVIL MISCELLANEOUS

Before R. S. Narula, J.

TULSI DASS AND OTHERS,—*Petitioners.*

versus

CHIEF SETTLEMENT COMMISSIONER, JULLUNDUR AND OTHERS,—*Respondents.*

Civil Writ No. 54 of 1966

October 31, 1966.

Displaced Persons (Compensation and Rehabilitation) Act (XLIV of 1954)—S. 25(2)—Displaced Persons (Compensation and Rehabilitation) Rules (1955)—Rule 67-A—Applicability of—Whether applies to transfer of proprietary rights in

(15) A.I.R. 1943 Sind. 148.