REVISIONAL CRIMINAL

Before Eric Weston, C.J.

GURBACHAN SINGH, SON OF BHAGAT SINGH,—*Convict-Petitioner.*

versus

THE STATE,—*Respondent.*

1951

November 23

Criminal Revision No. 954 of 1951

Criminal Procedure Code (Act V of 1898), Sections 342, 256 and 257—Scope of—Questions to be asked of an accused —Criminal trial—Practice—Forcing an accused person to summon prosecution witnesses as defence witnesses under section 257 instead of calling them for cross-examination under section 256 of the Code—Whether proper.

The examination of the accused before the charge was framed consisted of five questions, second of which was "Did you on the 4th February 1951, while in custody of police, make statement that you have kept radio, Ex. P. 1, *thans*, Ex. P. 4, and *suttar*, Ex. P.5, in your office and then lead the police to your house, opened the lock with the key, Ex. P. 2, produced by you and radio, Ex. P. 1, *thans*, Ex. P. 4. *suttar*, Ex. P. 5, were recovered covered by *khes*, Ex. P. 6, under *charpoy* in your residential house at your pointing out."

The magistrate, on 20th February 1951, ordered that a charge under section 411, I. P. C., be framed against the accused and that the case should come up two days thereafter. On 22nd February 1951, the magistrate made a note that the accused did not wish to cross-examine the prosecution witnesses already examined but sought permission to summon the complainant and the Sub-Inspector under section 257 of the Code. The magistrate's order on this was that the request was reasonable inasmuch as it helped in expediting the case.

Held, that the second of these questions was a grossly improper question to be asked of any accused. It contained an inquiry first as to statements said to have been made, secondly as to taking the police party to a particular house, thirdly as to opening the lock of that house with a particular key produced by the accused, fourthly as to the recovery of articles placed or concealed in a particular place and fifthly an inquiry or assertion that the house was the accused's residential house. It is quite impossible for any accused person to give a satisfactory and comprehensive answer to a question of this sort. Each one of these five matters should have formed the subject of a separate question by which the accused should have been asked to offer his explanation.

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The examination of the accused under section 342 of the Code of Criminal Procedure was made as follows :—

"Q. Have you committed the crime ?

A. No."

Held, that this is not the questioning generally on the case which is required to be made by section 342 of the Code.

Held, that it is quite impossible to believe that the request by the accused to call prosecution witnesses under section 257 rather than to exercise his right of cross-examining them could be genuine. The facts strongly suggest that a practice has come into being whereby in order to save the normal next hearing after charge when the accused is to be asked whether he wishes to recall prosecution witnesses, the accused is expected to waive that right on condition that the witnesses whom he wants should be summoned under section 257 of the Code. Section 257 has no application whatever to such circumstances and its use is a clear abuse of the procedure laid for the trial of warrant cases. Section 257 applies after an accused has entered upon his defence and it is intended to give an accused person opportunity, which the further progress of the case may have justified, for the attendance of a particular witness either for purpose of examination as a witness for the defence or for purpose of cross-examination as a witness already examined for the prosecution, but the necessity for whose further attendance was not apparent at the time of the applicability of section 256. While in the present case no complaint has been made by the accused of this procedure, it is necessary that it should be condemned.

Petition under section 436/439, Criminal Procedure Code, for revision of the order of Shri Gian Chand Bahl, Additional Sessions Judge, Amritsar, dated the 14th July 1951, modifying that of S. Gurbakhsh Singh, Magistrate, 1st Class, Amritsar, dated the 24th May 1951, convicting the petitioner.

H. S. GUJRAL, for Petitioner.

GURDEV SINGH, for Advocate-General, for Respondent.

JUDGMENT.

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E. WESTON, C. J. The applicant one Gurbachan Singh was convicted by a Magistrate, first class, Amritsar, under section 411 of the Indian Penal Code and sentenced to one year's rigorous imprisonment,

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The date of the conviction is 24th May 1951. He went in appeal but his conviction was upheld by the Additional Sessions Judge, Amritsar, the sentence being reduced to nine months' rigorous imprisonment. He then filed the present revision petition on the 29th of October. During the period since his conviction he has been in jail.

The facts of the case are that sometime about the beginning of January 1951 the accused had worked for a short period in a handloom factory of one Parkash Chand at Amritsar. There is some rather vague evidence that for a period, either before or after his employment, the accused had slept at the factory of Parkash Chand. On the night of the 31st of January theft took place in the factory, when property consisting of a radio set, pieces of cloth and bundles of yarn were stolen. A report was made by Parkash Chand the following morning to the Police, and in this report the articles stolen were stated. The report did not say that any one was suspected. Later, it appears, the accused and also one Bachan Singh were suspected, and on the 4th of February 1951 the accused was seen by Parkash Chand near a cinema at which the accused is said to have been there working. Sub-Inspector Raghbir Singh was informed. He came and the accused was caught and questioned. Some statement is said to have been made by the accused and the accused then took the police, Parkash Chand and other persons who had been called to join in the investigation to a house, the lock of which the accused opened with a key, and in the house the accused produced from under a *charpoy* covered with a cloth the stolen radio set, some pieces of cloth and bundles of yarn which were identified as part of those which had been stolen.

The accused denied commission of the offence. He called witnesses for the purpose of showing that the house had been allotted not to him but to his father Bhagat Singh with whom he was on bad terms, and that he (the accused) was living in another house. The learned Magistrate accepted the prosecution story and convicted him,

On examination of the record there have come to light certain material defects in the procedure which has been followed by the Magistrate. The examination of the accused before the charge was framed consisted of five questions. The first was merely accusation of commission of the offence to which the accused answered "No". The second was an omnibus question which I reproduce :—

> "*Q.* Did you on the 4th February 1951, while in custody of police, make statement that you have kept radio, Ex. P. 1, *thans*, Ex. P. 4, and *suttar*, Ex. P. 5, in your house and then lead the police to your house, opened the lock with the key, Ex. P. 2, produced by you and radio, Ex. P. 1, *thans*, Ex. P. 4, *suttar*, Ex. P. 5, were recovered covered by *khes*, Ex. P. 6, under *charpoy* in your residential house at your pointing out ?"

The third question was an inquiry whether the radio, *thans* and *suttar* belonged to him to which the accused answered "No." The fourth question was simply "*Q.* Why this case against you ? " to which the answer was "Due to enmity ". There was a further residuary question—"*Q.* Anything else to say? " to which the accused answered that he was innocent.

The second of these questions was a grossly improper question to be asked of any accused. It contained an inquiry first as to statements said to have been made, secondly as to taking the police party to a particular house, thirdly as to opening the lock of that house with a particular key produced by the accused, fourthly as to the recovery of articles placed or concealed in a particular place and fifthly an inquiry or assertion that the house was the accused's residential house. It is quite impossible for any accused person to give a satisfactory and comprehensive answer to a question of this sort. Each one of these five matters should have formed the subject of a separate question by which the accused should have been asked to offer his explanation. Of further examination of the accused under section 342 of the

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Code of Criminal Procedure no indication appears on the record kept by the Magistrate except a brief mention in a part of the note, dated the 22nd of February 1951 "Accused examined under section 342 as well and he does not wish to add anything to his previous statement". In the Urdu record the further examination of the accused appears as having been made as follows :—

"*Q.* Have you committed the crime?

A. No."

This is not the questioning generally on the case which is required to be made by section 342 of the Code. On this ground alone it is impossible to support the conviction which has been recorded.

There is a further point in this case which has caused me considerable anxiety. Section 256 of the Code requires that after the charge is framed the accused shall be asked at the next hearing of the case whether he desires to cross-examine any of the prosecution witnesses. The record shows a direction by the Magistrate, dated the 20th of February 1951, that a charge should be framed under section 411, Indian Penal Code, and that the case should come up two days thereafter. This suggests that the charge was not framed personally by the Magistrate but by someone in his office. The charge in fact is dated the 20th of February 1951. When the case came up on the 22nd of February the note of that date says that the accused does not wish to cross-examine the prosecution witnesses already examined but he seeks permission to summon the complainant and the Sub-Inspector under section 257 of the Code. The Magistrate's order on this is that the request is reasonable inasmuch as it helped in expediting the case. As the complainant and the Sub-Inspector were prosecution witnesses already examined I find it quite impossible to believe that the request by the accused to call them under section 257 rather than to exercise his right of cross-examining them could be genuine. If in fact the charge was framed on the 20th of February 1951 the request in no way expedited the case, for the 22nd of February was the next hearing at which the

accused should have been asked and purports to have been asked whether he wished to recall the prosecution witnesses for cross-examination. If the charge was read to the accused only on the 22nd of February, then no doubt an adjournment was saved. The facts strongly suggest that a practice has come into being whereby in order to save the normal next hearing after charge when the accused is to be asked whether he wishes to recall prosecution witnesses, the accused is expected to waive that right on condition that the witnesses whom he wants should be summoned under section 257 of the Code. Section 257 has no application whatever to such circumstances and its use is a clear abuse of the procedure laid down for the trial of warrant cases. Section 257 applies after an accused has entered upon his defence and it is intended to give an accused person opportunity, which the further progress of the case may have justified, for the attendance of a particular witness either for purpose of examination as a witness for the defence or for purpose of cross-examination as a witness already examined for the prosecution, but the necessity for whose further attendance was not apparent at the time of the applicability of section 256. While in the present case no complaint has been made by the accused of this procedure, it is necessary that it should be condemned.

On my finding of the improper nature of examination under section 342 of the Code the question arises whether I should order a retrial or set aside the conviction and sentence. The accused has already undergone about six months of the sentence of nine months. He is a young man said to be about 22 years of age. In these circumstances I do not think it necessary in the ends of justice that a retrial should be ordered. It will involve considerable expense to the State and any sentence which might be passed on a conviction would in the circumstances have to be nominal. I think, therefore, the proper course in this matter is to accept the revision application, set aside the conviction and sentence and direct the accused to be released.