1961

August 30.

PAYARE LAL

v.

STATE OF PUNJAB

(B. P. SINHA, C. J., A. K. SARKAR and J. R. MUDHOLKAR, JJ.)

Criminal Trial—Transfer of Special Judge—Successor, if can try on evidence partly recorded by him and partly by predecessor—Special Judge, if a magistrate—Want of competency, if can be cured—Criminal Law Amendment Act, 1952 (46 of 1952), s. 8, sub-ss. (1), (3) Code of Criminal Procedure, 1898 (V of 1898), ss. 251 to 259, 350, 537.

The appellant and another were prosecuted for offences under s. 5(2) of the Prevention of Corruption Act, 1947. The trial commenced before the special Judge who heard the evidence but before he could deliver judgment was transferred and was succeeded by another special Judge. The latter did not recall the witnesses and did not hear the evidence over again, but proceeded with the trial without any objection from either side from the stage at which his predecessor had left. He convicted both the accused.

On appeal, the Punjab High Court held that s. 350 Criminal Procedure Code applied to the trial before a special Judge in view of s. 8(1) of the Criminal Law Amendment Act, 1952, and the succeeding special Judge was entitled to proceed on the evidence recorded by his predecessor.

The controversy is whether s. 350 of the Code of Criminal Procedure is applicable to a special Judge under sub-s.(1) of s. 8 of the Criminal Law Amendment Act, 1952, though it is not applicable under sub-s. (3) of the Act. Therefore the question is what is meant by the words "The procedure prescribed by the court..... for the trial of warrant cases by magistrate" in sub-s.(1) of s. 8 of the Act, and whether s. 350 of the Code prescribe one of the rules of such procedure.

The Act was since amended and therein it is expressly provided that s.350 of the Code applies to the proceedings before a special Judge. The amendment does not govern the present proceeding as the impugned part of the proceedings was concluded before the amendnent.

Held, that the Criminal Law Amendment Act, 1952, did not intend that s. 350 of the Criminal Procedure Code would be available as a rule of procedure prescribed for the trials of warrant cases, to a special Judge as the special Judge was not a magistrate for the purpose of the Act not did the Act require before the amendment that he was to be deemed to be such.

The Act in using the words "procedure prescribed by the Code.....for the trial of warrant cases by magistrate" meant only the ss. 251 to 259 of the Criminal Procedure Code as expressly referred in the code as containing the procedure spcified for the trials of warrant cases by magistrate and did not contemplate s. 350 of the Code as a procedure so prescribed.

Held, futher, that where in a case there is want of competency and not a mere irregularity, s. 537 of the Code of Criminal Procedure has no application. It cannot be called in aid to make what was incompetent, competent.

Held, also, that it is the right of an accused person that his case should be decided by a Judge who has heard the whole of it and that very clear words would be necessary to take away such an important and well established right.

In the present case the succeeding special Judge had no authority under the law to proceed with the trial of the case from the stage at which his predecessor in office left it, and the conviction of the appellant cannot be supported as he had not heard the evidence in the case himself. The proceeding before the succeeding special Judge were clearly incompetent. There has been no proper trial of the case and there should be one.

In re-Vaidyanatha Iyer, (1954) 1 M. L. J. 15, not Applicable.

Pulukuri Kotayya v. *King Emperor*,- (1947) L. R. 74 I.A. 65 and *Kimbray* v. *Draper*, (1868) 3 Q. B. 160, referred to.

In re-Fernandez. (1958) II M. L. J. 294, approved.

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 240 of 1960.

Appeal by special leave from the judgment and order dated November 25, 1958, of the Punjab High Court in Criminal Appeal No. 114 of 1954.

Jai Gopal Sethi, C. L. Sareen and *R. L. Kohli*, for the appellant.

N. S. Bindra, R. H. Dhebar and *D. Gupta*, for respondent.

1961. August 30. The Judgement of the Court was delivered by

Sarkar J.

SARKAR, J.—The appellant Payare Lal was the Tehsildar of Patiala. He and Bishan Chand, a Patwar clerk of the Tehsil Office, were prosecuted for offences under s.5(2) of the Prevention of

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Corruption Act, 1947. The Criminal Law Amendment Act, 1952 (Act XLVI of 1952), to which it will be convenient hereafter to refer as the Act, required the trial to be held by a special Judge appointed under it and in accordance with certain provisions of the Code of Criminal Procedure mentioned in s. 8 of the Act. The Principal question in this appeal turns on the construction of sub-s. (1) of this section which we will later set out.

The trial commenced before S. Narinder Singh the special Judge, Patiala. He heard the evidence but before he could deliver a judgment he was transferred and was succeeded by S. Jagjit Singh. S. Jagjit Singh did not recall the witnesses and hear the evidence over again, but proceeded without any objection from either side, with the trial from the stage at which his predecessor had left it and having heard the arguments of the advocates for the parties, delivered his judgment convicting both the accused of the offences with which they had been charged and passed certain sentences on them.

The accused appealed against their conviction to the High Court of Punjab. The appeals came to be heard by Mehar Singh J., who, though no point had been taken by the accused, himself felt considerable difficulty as to whether S. Jagjit Singh had the power to decide the case on the evidence recorded by his predecessor and referred the matter to a larger bench taking the view that if the course followed was defective, the defect would be one of jurisdiction of the Court and could not be cured by the consent of parties.

The case was thereupon heard by a bench of that High Court constituted by Gurnam Singh and Mehar Singh JJ. who took different views. Gurnam Singh J. held that s. 350 of the Code applied to the trial before a special Judge in view of s. 8(1) of the Act and under the terms of s. 350, which we will later set out, S. Jagjit Singh was entitled to proceed on the evidence recorded by his predecessor

S. Narinder Singh, while Mehar Singh J., was of the opinion that s. 8(1) of the Act did not make s. 350 of that Code applicable to such a trial. He also held that what S. Jagjit Singh had done was not a matter of mere irregularity curable under s. 537 of the Code. The matter was then referred to Passey J., who agreed with Gurnam Singh J. On the question of s. 537 of the Code, Gurnam Singh and Passey JJ. expressed no opinion in the view that they had taken of s. 8(1) of the Act.

The appeals were thereafter heard on the merits by Tek Chand J. who upheld the conviction of the appellant but reduced the sentence passed on him. He, however, acquitted the other accused Bishan Chand, giving him the benefit of doubt. The appellant has now come up to this Court in further appeal with special leave. There is no appeal by the State against the acquittal of Bishan Chand.

There is no covntroversy that the general principle of law is that a judge or magistrate can decide a case only on evidence taken by him. Section 350 of the Code is a statutory departure from this principle. That section so far as material was at the date S. Jagjit Singh decided the case in these terms :

> *S. 350.* Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself or he may resummon the witnesses and recommence the inquiry or trial.

It is only if this provision was available to S. Jagjit Singh that the course taken by him can be supported.

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As we have said earlier, s. 8 of the Act makes certain provisions of the Code applicable to the proceedings before a special Judge. The question is whether s. 350 of the Code was one of such provisions. The answer to this question will depend on the construction of sub-ss.(1) and (3) of s. 8 of the Act, the material portions of which we now set out.

> *S. 8 (1)*—A special judge may take cognizance of offences without the accused being committed to him for trial, and in trying the accused persons, shall follow the procedure prescribed by the Code of Criminal Procedure, 1898...for the trial of warrant cases by magistrates.
>
> (3) Save as provided in sub-section (1) .....the provisions of the Code of Criminal Procedure, 1898, shall, so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge ; and for the purposes of the said provisions, the Court of the special judge shall be deemed to be a Court of session trying cases without a jury or without the aid of assessors.....

In substance these sub-sections provide that a special Judge shall follow the procedure prescribed by the Code for the trial of warrant cases by magistrates and save to this extent, the provisions of the Code applicable to a Court of session, shall govern him as if he were such a Court subject to certain qualifications which are not relevant for the present case. There is no controversy that s. 350 of the Code is applicable only to magistrates and not a Court of session and cannot therefore be applied to a special Judge under sub-s. (3) as it makes only those provisions of the Code applicable to him which would apply to a Court of session. The only controversy is whether that section is applicable to a special Judge under sub-s.(1) of s. 8 of the Act. If it is so applicable, it must be applied

though under sub-s. (3) it is not applicable, for this sub-section is to have effect "Save as provided in sub-section (1)".

The real question is, what is meant by the words "the procedure prescribed by the Code .....for the trial of warrant cases by magistrates" in s. 8(1) of the Act ? Does s. 350 of the Code prescribe one of the rules of such procedure ? It is necessary however to point out that by an amendment made in the Act after judgment had been delivered in this case by S. Jagjit Singh, it has been expressly provided that s. 350 of the Code applies to the proceedings before a special Judge. On the amended Act, therefore, the question that has arisen in this case, would no longer arise. For reasons to be hereafter stated, this amendment clearly does not govern the proceedings before S. Jagjit Singh and this case has to be decided without reference to the amendment.

Is was once held by the Madras High Court in *In re Vaidyanatha Iyer* (1) that s. 350 of the Code prescribed a rule of procedure for the trial of warrant cases as mentioned in s. 8 (1) of the Act. This seems to be the only reported decision taking that view. All other decisions which have been brought to our notice take the contrary view. Even in Madras, in *In re Fernandez* (2), a Full Bench of the High Court has now held that s. 350 of the Code was not applicable to a special Judge and has overruled *In re Vaidyanatha Iyer* (1). That appears to be the position on the authorities.

It is true that s. 350 of the Code is a provision applying to all magistrates and therefore, also to a magistrate trying a warrant case. That however does not in our opinion decide the question. We think it relevant to observe that it is a right of an accused peson that his case should be decided by a judge who has heard the whole of it and we agree with the view expressed in *Fernandez's case*(2)

(1) (1954) 1 M.L.J. 15 ; A.I.R. (1954) Mad. 350.
(2) (1958) II M.L.J. 294.

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that very clear words would be necessary to take away such an important and well established right. We find no such clear words here.

We turn now to the word used. When sub-s. (1) of s. 8 of the Act talks of a procedure prescribed by the Code for the trial of warrant cases by magistrates, it is reasonable to think that it has the provisions and the language of the Code in view. When we look at the Code, we find that ch. XXI is headed "Of the Trial of Warrant Cases by Magistrates". This chapter consists of ss. 251 to 259. Section 251 is in these terms :

> *S. 251* In the trial of warrant cases by Magistrates, the Magistrate shall,—
>
> (a) in any case instituted on a police report, follow the procedure specified in section 251A; and
>
> (b) in any other case, follow the procedure specified in the other provisions of this Chapter.

The Code, therefore, expressly refers to ss. 251-259 as containing the procedure specified for the trial of warrant cases by magistrates; this then, is the procedure it prescribes for the trial of such cases. It would be legitimate, therefore, to think that the Act in using the words "procedure prescribed by the Code.....for the trial of warrant cases by magistrates" also meant only these sections of the Code and did not contemplate s. 350 of the Code as a procedure so prescribed, though that section is applicable to the proceedings before a magistrate trying a warrant case. It does not seem to us that the words "the procedure prescribed by the Code.....for the trial of warrant cases by magistrates" meant a procedure which may be followed by magistrates in all cases. Further more s. 350 occurs in a chapter of the Code which deals with general provisions relating to inquiries and trials and is not a provision which has been specifically prescribed by the Code for application to the

trial of warrant cases by magistrates, as are ss. 251 to 259.

Again, s. 350 of the Code cannot, without doing violence to the language used in it, be applied to the proceedings before a special Judge. Clearly it cannot be applied where its terms make such application impossible. Now the section can be applied only when one magistrate succeeds another. It lays down what the succeeding magistrate can do. Now suppose one special Judge succeeds another. How can he exercise the powers conferred by the section ? The section applies only when the predecessor is a magistrate. The predecessor in the case assumed is however a special Judge. Such a Judge is not a magistrate for the purpose of the Act, nor does the Act require that he is to be deemed to be such. Section 8 (1) of the Act which only requires a special Judge to follow the procedure for the trial of a warrant case, cannot justify the creation of a fiction making the predecessor special Judge, a magistrate. It is of some interest to note here that the amendment to the Act which expressly makes s. 350 of the Code applicable to proceedings before a special Judge also provides that for the purposes of so applying the section, "a special Judge shall be deemed to be a magistrate". Clearly, the legislature thought that unless such a fiction was created, the application of the section to the proceedings before a special Judge would create difficulties or anomalies. Therefore also, the Act could not in our view, have intended that s. 350 of the Code would be available to a special Judge as a rule of procedure prescribed for the trial of warrant cases.

For all these reasons, we would prefer the opinion expressed by Mehar Singh J. We think that under the Act, as it stood before its amendment as aforesaid, s. 350 of the Code was not available when one special Judge succeeded another. We hold that S. Jagjit Singh had no authority

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under the law to proceed with the trial of the case from the stage at which S. Narinder Singh left it. The conviction by S. Jagjit Singh of the appellant cannot be supported as he had not heard the evidence in the case himself. The proceedings before him were clearly incompetent.

It is then said that this defect was a mere irregularity and the conviction of the appellant can, if sustainable on the evidence, be upheld under s. 537 of the Code. In regard to this section, it was said by the Privy Council in *Pulukuri Kotayya* v. *King Emperor* (1),

> "When a trial is conducted in a manner different from that prescribed by the Code (as in N. A. Subramania Iyer's case, 1901 L.R. 28 I.A. 257), the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code".

It seems to us that the case falls within the first category mentioned by the Privy Council. This is not a case of irregularity but want of competency. Apart from s. 350 which, as we have said, is not applicable to the present case, the Code does not conceive of such a trial. The trial offends the cardinal principle of law earlier stated, the acceptance of which by the Code is clearly manifest from the fact that the Code embodies an exception to that principle in s. 350. Therefore, we think that s. 537 of the Code has no application. It cannot be called in aid to make what was incompetent, competent. There has been no proper trial of the case and there should be one.

(1) (1947) L.R. 74 I.A. 65, 75.

Then it is said on behalf of the appellant that we should not send the case back for a fresh trial but decide it ourselves on the evidence on the record. Coming from the appellant, it is a somewhat surprising contention. According to him, a point which we have accepted, there has realy been no proper trial of the case. It would follow from this that there has to be one. In the absence of such a trial we cannot even look at the evidence on the record.

Lastly, we have to say a few words on the amendment of the Act expressly making s. 350 of the Code applicable to the proceedings before a special Judge. The amendment came long after the decision of the case by S. Jagjit Singh and had not expressly been made retrospective. It was said on behalf of the respondent, the prosecutor, that the amendment being in a procedural provision was necessarily retrospective, and, therefore, no exception can now be taken to the action taken by S. Jagjit Singh. Assuming that the rule contained in s. 350 of the Code is only a rule of procedure, all that would follow would be that it would be presumed to apply to all actions pending as well as future : *Kimbray* v. *Draper* (1). Such a retrospective operation does not assist the respondent's contention.

Nor do we think it an argument against sending the case back for retrial that the special Judge now hearing the case would be entitled to proceed on the evidence recorded by S. Narinder Singh in view of the amendment. Whether he would be entitled to do so or not would depend on whether the amended Act would apply to proceedings commenced before the amendment. It has to be noted that the impugned part of the proceedings was concluded before the amendment. On this question, we do not propose to express any opinion. In any event, under s. 350 as it now stands a succeeding magistrate

(1) [1868] 3 Q.B. 160.

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has power to resummon and examine a witness further. We connot speculate what the special Judge who tries the case afresh will think fit to do if s. 350 of the Code is now applicable to the proceedings before him. For all these considerations, we think it fit to send the case back for retrial.

We therefore, allow the appeal and set aside the conviction of the appellant and the sentence passed on him. The case will now go back for retrial according to law.

Appeal allowed

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THE STATE OF PUNJAB

v.

BARKAT RAM

(J. L. KAPUR, K. SUBBA RAO and RAGHUBAR DAYAL JJ.)

Customs Officer—If a police officer—Land Customs—Offences under the Sea Customs Act—Confessions made to Customs Officers—Conviction on the basis of such confessions—Validity—Land Customs Act, 1924 (19 of 1924), s.9(1)—Foreign Exchange Regulation Act, 1947 (7 of 1947), s. 23(1)—Sea Customs Act, 1878(8 of 1878), ss. 6, 167(8)—Police Act, 1861 (5 of 1861), s. 1—Indian Evidence Act, 1872 (1 of 1872) s. 25.

On receipt of information that some gold would be smuggled from Pakistan to India by the engine crew of the train coming from Lahore, the Land Customs staff searched the engine on the arrival of the train at Amritsar and recovered a quantity of gold kept hidden underneath the coal in the tender of the engine. The driver of the engine, the respondent, who was arrested and taken to the Customs Office for interrogation, made statements before the Customs officials admitting his guilt. On the complaint of the Assistant Collector of Land Customs, the respondent was tried for offences under s. 23(1) of the Foreign Exchange Regulation Act, 1947, and s. 167(8) of the Sea Customs Act, 1878, and convicted by the Magistrate, but on revision the High Court of Punjab set aside the conviction on the grounds *inter alia* that Customs Officers were police officers within the meaning of that expression in s. 25 of the Indian Evidence Act, 1872,