granted on the 1st June would necessarily be of a different character, and if it is desired that, in order to secure the safety of the passengers, a ship leaving at the end of May should also hold a rough weather certificate, if the ship does not return during May, then that must be provided for by an amendment in the Act. It seems curious that the learned Magistrate has not noticed in convicting the accused under section 9, taken with section 31, that it is nowhere stated from what port the ship commenced the voyage without a certificate. That would be in itself sufficient to vitiate the conviction. But in any event I am of opinion that on the facts of this case the voyage from Bombay to Goa and back was one voyage. I think, therefore, that the conviction was wrong and it must be quashed, and if the fine has been recovered it must be refunded.

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SHAH, J.:—I agree.

Conviction and sentence reversed.

R. R.

CRIMINAL REVISION.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

EMPEROR *v.* GULABJAN.*

1921.

September 27.

Criminal Procedure Code (Act V. of 1898), section 342—Summons case—Examination of accused—Omission to examine vitiates the trial.

A Magistrate is bound, in a summons case, to examine the accused, as required by section 342 of the Criminal Procedure Code, 1898. If he omits to examine the accused it is an irregularity which vitiates the trial.

Emperor v. *Fernandez* (1), followed.

Per MACLEOD, C. J.:—"The provisions of section 342 of the Criminal Procedure Code...taken in conjunction with the provisions of section 364 of the Code, require amendment....It seems to me that while it is obligatory

* Criminal Application for Revision No. 191 of 1921.

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on the Magistrate to give the accused an opportunity of explaining the evidence against him according to the provisions of section 342, Criminal Procedure Code, it is certainly desirable that he should not be hampered in these petty cases by the provisions of section 364, Criminal Procedure Code.

Per SHAH, J. :—"As regards the obligation to record the examination of the accused in the manner required by section 364 of the Code, the matter stands on a different footing ; because the non-compliance with the provisions of that section may not necessarily involve the same consequences as the failure to observe the provisions of section 342 does."

THIS was an application to reverse the conviction and sentence passed by H. P. Dastur, Acting Fourth Presidency Magistrate of Bombay.

The accused was charged with an offence punishable under section 120 of the City of Bombay Police Act (Bombay Act IV of 1902), which was tried as a summons case. She was at first placed for trial before a Bench of Honorary Presidency Magistrates ; but was eventually tried by the Acting Fourth Presidency Magistrate.

The Magistrate omitted to examine the accused as provided by section 342 of the Criminal Procedure Code. The accused was convicted and sentenced to pay a fine of Rs. 5.

The accused applied to the High Court.

A. A. Adarkar, for the accused :—The trying Magistrate has omitted to examine the accused as required by section 342 of the Criminal Procedure Code. The conviction is, therefore, bad : see *Emperor* v. *Fernandez*[1] and *Gulam Rasul* v. *The King-Emperor*[2].

S. S. Patkar, Government Pleader, for the Crown :—The provisions of section 342 of the Criminal Procedure Code, 1898, do not apply to summons cases. The words "before he is called on for his defence" are appropriate only in warrant cases (section 256, and

(1) (1920) 45 Bom. 672. (2) (1921) 6 P. L. J. 174.

sessions cases (section 289, clause 4). Calling on an accused person to enter on his defence is distinct from examining the accused under section 342: see *Queen Empress* v. *Imam Ali Khan*[1]. The words "calling on an accused person to enter on his defence" appear in the procedure of "warrant cases" and "sessions cases" and do not appear in Chapter XX relating to summons cases. Therefore section 342 has no application. The procedure prescribed for summons cases provides occasions for questioning the accused. When he appears or is brought before the Magistrate he is asked "if he has any cause to show why he should not be convicted" (section 242). Next, at the conclusion of the case for the prosecution the Magistrate shall "hear the accused," section 244, and at the conclusion of the whole case the Magistrate may (if he thinks fit) examine the accused, section 245. The accused has three opportunities in summons cases to state his defence.

The "hearing of the accused" under section 244 would indicate that the accused may make his statement orally and the Magistrate may hear it and not necessarily reduce it to writing; whereas, if the accused is questioned under section 342, the cumbrous machinery of section 364 is set in motion.

MACLEOD, C. J.:—The 2nd accused was charged before the Honorary Magistrates together with three other persons with having committed an offence under section 120 of the Bombay City Police Act. The case was transferred to the Presidency Magistrate's Court, and eventually the first three accused were found guilty and fined. The 2nd accused has applied to the High Court to exercise its revisional powers on the ground that the accused was not questioned under section 342,

[1] (1895) 23 Cal. 252.

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Criminal Procedure Code. We called for a report from the Magistrate who tried the case and he says :—

"It seems from the record, that she (accused No. 2) was not examined by me under section 342, Criminal Procedure Code, as she ought to have been, after the evidence for the prosecution had been taken. This, probably, was due to an oversight, as it is my invariable practice to examine an accused person under section 342, Criminal Procedure Code, in every case in which the plea is of not guilty. I have only to add that the applicant was represented by a pleader, and called witnesses on her behalf, so that she must have been perfectly aware of the specific charge, and the allegation she had to meet."

Now it has been decided by this Court in *Emperor* v. *Fernandez*[1] that the omission by the Magistrate to examine the accused person as required by section 342, Criminal Procedure Code, is an irregularity which vitiates the conviction. We are not at liberty to differ from that decision without referring the matter to a Full Bench. I do not think we should do that in this case.

The remarks that I shall make are only for the purpose of drawing the attention of Government to the provisions of section 342, Criminal Procedure Code, which, in my opinion, taken in conjunction with the provisions of section 364, Criminal Procedure Code, require amendment. Section 241 and the following sections lay down the procedure to be observed by Magistrates in the trial of summons cases. Under section 244 the Magistrate has to take all such evidence as is produced in support of the prosecution, if the accused does not admit the offence, and also to hear the accused and take all such evidence as he produces in his defence; and under section 245 the Magistrate shall, if he thinks fit, examine the accused at the close of the evidence. Nothing is stated in those sections with regard to the Court questioning the accused before he enters upon his defence so as to

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give him an opportunity of explaining the evidence given against him by the prosecution.

But under section 342, which comes in Chapter XXIV, headed "General Provisions as to Inquiries and Trials," the Court shall, for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him at any stage of any inquiry or trial, question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence.

It has been contended that none of the sections prescribing the procedure to be followed in summons cases contain the words "before he is called on for his defence", whereas in the sections prescribing the procedure to be followed in the trial of warrant and Sessions cases those words are used, and therefore, it was not intended that it should be obligatory on the Court to question the accused in summons cases, as section 244 only required that the accused should be heard.

I doubt whether that is a sound argument, as every accused person has a right to be called on for his defence, and when section 244 lays down that the Magistrate shall hear the accused, it certainly means that he should ask the accused what he has to say in his own defence against the charge which has been brought against him, and in explanation of the evidence which has been led to support the charge. It does not seem to me that there is very much difference between hearing the accused and questioning him generally to enable him to explain the circumstances appearing in the evidence against him; and if it had not been for the provisions of section 364, it would be perfectly correct if the Magistrate, in trying a summons case, in which he has not to take

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down the evidence, simply recorded the fact that the accused had been questioned under section 342.

But unfortunately section 364(*1*) prescribes that—

"Whenever the accused is examined by any Magistrate...the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English: and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers."

By sub-section (*2*)—

"When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing, and that the record contains a full and true account of the statement made by the accused."

So that even when the Magistrate is not obliged to record the evidence he has to examine or question the accused under section 342, and then he has to observe all the provisions of section 364, with the result that the time required for the hearing of the case may be extended to a period quite out of proportion to the time which would ordinarily be taken in deciding whether the accused was guilty or not of the charge against him. It seems to me, therefore, that while it is obligatory on the Magistrate to give the accused an opportunity of explaining the evidence against him according to the provisions of section 342, Criminal Procedure Code, it is certainly desirable that he should not be hampered in these petty cases by the provisions of section 364, Criminal Procedure Code. However that is not a matter which this Court can deal with, and it must be left to the Legislature to relieve the Magistrates of the burden which at present is cast upon them.

The result must be in this case that as the accused was not examined, the conviction must be set aside, and the fine, if paid, refunded.

SHAH, J.:—I concur in the order proposed. As regards the applicability of section 342 of the Criminal Procedure Code to the trial of summons cases by Presidency Magistrates and the effect of not examining an accused person as required by that section in such cases I have nothing to add to what I have stated in my judgment in *Emperor* v. *Fernandez*[1]. The section applies to such trials, and it is obligatory upon the Presidency Magistrates to examine the accused after the evidence for the prosecution is finished with a view to enable him to explain the evidence against him.

As regards the obligation to record the examination of the accused in the manner required by section 364 of the Code of Criminal Procedure the matter stands on a different footing; because the non-compliance with the provisions of that section may not necessarily involve the same consequences as the failure to observe the provisions of section 342 does. As the section stands at present, I am of opinion that it is obligatory upon the Magistrates to record the examination of the accused in the manner provided by the section. But I entirely agree with the observations of the learned Chief Justice that in the case of Presidency Magistrates it may be desirable to relieve them from the obligation to follow the provisions of that section in recording the examination of the accused persons in summons cases. It is to be noted that as regards the examination of an accused person in summary trials outside the Presidency

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towns, sub-section (4) of section 364 provides that the provisions of that section will not apply to such examination. It is also significant that the Presidency Magistrates have been given very wide discretion in the matter of recording evidence in cases in which the sentences would not be appealable; and it would be consistent with the policy indicated by these provisions in the Code of Criminal Procedure to relax the provisions of section 364 of the Criminal Procedure Code in the direction suggested so far as the Presidency Magistrates are concerned.

Conviction and sentence set aside.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1921. *September 27.*

RATANLAL BHOLARAM AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS *v.* GULAM HUSEN ABDULALLI (ORIGINAL PLAINTIFF), RESPONDENT*.

Indian Easements Act (V of 1882), section 15—Easement—Acquisition by prescription—Burning down of the house during the period of acquisition—Re-building of the house—Enjoyment of easement treated as continuous.

Where the owner of a building, who, in the course of acquiring a right of easement by prescription, has his house burnt down, begins immediately to rebuild it and places the windows exactly in the same position as before, he can be regarded as enjoying the access and use of light and air continuously and will be entitled to protection after twenty years from the first building. If, however, there is any delay in re-building, then it might be evidence of an intention not to resume the user.

SECOND appeal from the decision of P. E. Percival, District Judge of Khandesh, confirming the decree passed by K. K. Sunavalla, Subordinate Judge at Bhusawal.

Suit for injunction.

* Second Appeal No. 286 of 1921.