

## CRIMINAL REVISION.

*Before U Aung Tha Gyaw, J.*

MAUNG ANT BWE AND ONE (APPLICANTS)

v.

THE UNION OF BURMA (RESPONDENT).\*

H.C.  
1948

Aug. 18.

*Criminal Procedure Code, s. 256 (1) and (2)—Non-compliance—Effect of.*

*Held:* The right to recall prosecution witnesses is given by section 256 (1), Criminal Procedure Code and the right to give evidence on his own behalf is provided for in the second part of the section. The terms of these subsections are in their nature and wording mandatory in character. Any failure on the part of the trying Magistrate to comply with these provisions must be regarded as vitiating the trial irrespective of whether any failure of justice is occasioned thereby.

*Madura Muthu Vannian and six others, I.L.R. 45 Mad. 820, applied.*

U AUNG THA GYAW, J.—The two applicants were charged and convicted under section 427 of the Penal Code and were each sentenced to pay a fine of Rs. 30 with the option of three weeks' rigorous imprisonment in default.

The learned trying Magistrate conducted the trial summarily as provided in Chapter XXII of the Code. A perusal of the trial record shows that there was no compliance with the provisions of section 256 of the Code and the learned Sessions Judge (Magwe) has accordingly recommended that the convictions and sentences passed upon the applicants be quashed.

The learned Sessions Judge's recommendations must be unreservedly accepted. In the trial of warrant cases by Magistrates either ordinarily or summarily, the procedure provided in Chapter XXII of the Code must be strictly observed and the trial record must clearly show this compliance with the law.

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\* Criminal Revision No. 127B of 1948 being review of order of Headquarters Magistrate, Minbu, dated the 8th June 1948, passed in Criminal Summary Trial No. 28 of 1948.

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In the present case there is no record of the fact that either section 256, sub-section (1) or sub-section (2) has been duly complied with. The terms of both these sub-sections are both in their nature and in their wording mandatory in character and any failure on the part of the trying Magistrate to comply with these provisions must be regarded as vitiating the trial irrespective of the question as to whether any failure of justice had in fact occasioned thereby. Under the first part of the section after the accused has claimed to be tried he shall be required to state forthwith whether he wishes to cross-examine any, and if so, which of the witnesses for the prosecution whose evidence has been taken. The accused shall then be called upon to enter upon his defence. Then under the second part of the section the accused shall be asked whether he desired to give evidence on his own behalf and the Magistrate shall warn him in the manner required by sub-section (1) of section 342 of the Code of Criminal Procedure.

The right to recall prosecution witnesses provided in the first part of the section and the right to give evidence on his own behalf provided in the second part of the section are statutory rights which cannot be lightly denied to an accused person. In fact, there is no provision in the Code by which an accused person can be deemed to have waived or forfeited his right and as the Code now stands as amended it is the bounden duty of all Magistrates to see that accused persons are given the opportunity to exercise these rights. Failure to observe the requirements of these two sub-sections must be regarded as an illegality which vitiates the whole trial. Failure to re-examine an accused person after the further cross-examination of prosecution witnesses has been regarded as an illegality having the same consequence to the trial.

[*Madura Muthu Vannian and six others* (1)]. Failure to give an accused person an opportunity of explaining the evidence against him in the manner allowed to him by law would appear to be an illegality of equal importance.

Accordingly the conviction and sentences passed upon the two applicants will be set aside and they shall be set at liberty so far as this case is concerned. The fines, if paid by them, will be refunded.

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(1) I.L.R. 45 Mad. 820.