(1925) 11 CAL CK 0003

Calcutta High Court

Case No: None

Mahomed Rafique		APPELLANT
	Vs	
King-Emperor		RESPONDENT

Date of Decision: Nov. 24, 1925

Acts Referred:

- Bengal Excise Act, 1909 - Section 46
- Criminal Procedure Code, 1898 (CrPC) - Section 367

Citation: AIR 1926 Cal 537

Judgement

1. The appellant before us named Mahomed Rafique has been convicted u/s 46, Act V of 1909--The Bengal Excise Act-and has been sentenced to undergo rigorous imprisonment for a period of one year.

2. The facts are as follows:--On the 19th January 1925, the appellant, along with two others, was arrested by Excise Sub-Inspector, Probhat Chandra Sen Gupta at Premises No. 356, Upper Chitpur Road, in Calcutta. On a search being made, several quantities of cocaine were found to be in possession of the persons arrested. Thereafter they were sent up for trial for having been in illicit possession of cocaine without a license in contravention of the provisions of Section 46 of the Bengal Excise Act. The trial, so far as the present appellant is concerned, commenced on the 20th January 1925, before Mr. Keays, Additional Chief Presidency Magistrate. It was alleged that the appellant had in his possession cocaine in a phial which was found in a chula under a wooden taktaposh in his shop, and it was further alleged that 83 packets of cocaine were found in a bamboo pipe hidden between two taktaposhes in front of the accused"s shop, but the charge against the appellant was, as far as we can make out from the record, in respect of having been in illicit possession of 155 grains of cocaine without license. The trial went on from the 20th January 1925, to the 21st of July 1925, when Mr. Keays, the trying Magistrate, proceeded on leave. On that date he recorded the following order in the order sheet: "I am going on leave. I had written my judgment (which I append to the record) on the 3rd July and I had only to sign it. The accused has absconded. I leave the judgment

for my successor to deal with as he thinks fit." In the margin there is a note by Mr. Keays" successor, Mr. A.Z. Khan, in these words: judgment kept with me Sd. A.Z. Khan 21-7-25."

3. On the 22nd August 1925, it appears that the accused who had been absent since the 11th July 1925, surrendered before the Magistrate, Mr. Khan, and filed a petition stating that he did not want a de novo trial. Thereupon the learned Magistrate, Mr. Khan, recorded the following order in the order sheet: Mr. Keays, Additional Chief Presidency Magistrate on leave, who tried the case, has left a written judgment, before he made over charge to me, undated and unsigned. I am signing and dating that judgment and pronouncing it. Accused is sentenced u/s 46, Act V of 1909, to one year"s rigorous imprisonment. Cocaine to be destroyed."

4. On behalf of the appellant it has been contended before us by Mr. H.M. Bose that the judgment which the learned Magistrate, Mr. A.Z. Khan signed and dated and pronounced was not a judgment arrived at by him after consideration of the evidence on the record and after hearing of the arguments, if any, on behalf of the appellant, and that therefore it could not be treated as a judgment within the meaning of Section 367, Criminal Procedure Code. The contention advanced on behalf of the appellant has led us to examine the record in this case minutely, and as a result of such examination we have discovered, apart from the question raised before us and to which we shall advert presently, various other irregularities which cannot be overlooked. It appears from the order sheet that on the 20th March 1925, a charge was framed against the accused and on the framing of such charge the accused was examined. Now, as far as we can find from the record, although the order sheet states that a charge was framed against the accused and that the accused was examined, there was, as a matter of fact, no charge framed against the accused, as it ought to have been done, under the provisions of Section 254 Criminal Procedure Code; nor is it apparent to us from the record that the accused was examined in a regular manner under the provisions of Section 342, Criminal Procedure Code. As far as we can find from the record, what appears therein is as follows: "Not guilty. The cocaine was found in a chula in the passage outside my shop which has no door. The chula was under a bench which belongs to the landlord and not to me." It is quite clear from the record that this is what the accused must have stated at the time he was brought before the Magistrate and that this could not in any way be treated as an examination u/s 342, Criminal Procedure Code; nor can we treat what follows later on, namely: "I was not present at the search", as an examination u/s 342, Criminal Procedure Code. The case against the accused was a warrant case and it was imperative on the learned Magistrate, Mr. Keays, that he should draw up a formal charge against the accused in the manner indicated in Section 254, Criminal Procedure Code, and that he should comply strictly with the provisions of Section 342, Criminal Procedure Code. Nothing appears to have been done in accordance with the provisions of the law, and a perusal of the order sheet leaves the impression that a warrant case, which rendered the accused liable to undergo rigorous imprisonment for a period of one year, was conducted in the Magistrate"s Court in a careless manner. We must express our

regret that this should have been allowed.

5. As regards the precise contention which has been urged before us, we think there is considerable force in it. Section 350, Criminal Procedure Code, no doubt authorizes a Magistrate to try a case on evidence recorded by his predecessor, but there is no authority for the proposition that a Magistrate who succeeds his predecessor can deliver a judgment which had been written out by his predecessor without considering the evidence on the record and without hearing the arguments, if any, on behalf of the accused [see in this connexion Baisnab Charan Das Vs. Amin Ali, .] Such a procedure cannot stand to reason, because the Magistrate who makes himself responsible for the judgment must always be the Magistrate who, before delivery of the judgment had considered the evidence on record fairly and impartially, and had also listened to the arguments, if any, on behalf of the accused. It is abundantly clear from the order-sheet that the Magistrate who succeeded Mr. Keays, namely, Mr. Khan, did not consider the evidence on the record, nor did he hear any arguments on behalf of the accused before he signed and dated the judgment (which had been written out by Mr. Keays) and pronounced it. We think that the trial on the whole has been conducted in an extremely unsatisfactory manner and that the requirements of justice demand of us that we should set aside the conviction and sentence passed on the appellant and direct that the case be re-tried, either by the Chief Presidency Magistrate or by a Magistrate other than Mr. Keays and Mr. Khan, to be nominated by the Chief Presidency Magistrate. One would have thought that in a case of this description the trying Magistrate would have made it his business to see that the essential formalities laid down in the Code of Criminal Procedure were observed. There has been no such observance and we have no other alternative but to direct a re-trial in manner indicated above. The accused will remain on the same bail pending the order of the Magistrate who will try the case. Let the record be sent down at once.