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**(1954) 06 CAL CK 0019**

**Calcutta High Court**

**Case No:** Criminal Revision Cases No"s. 682, 683 and 684 of 1954

Kalidas Banerjee

APPELLANT

Vs

The State

RESPONDENT

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**Date of Decision:** June 28, 1954

**Acts Referred:**

- Criminal Procedure Code, 1898 (CrPC) - Section 205, 205(1), 205(2), 206, 353

**Citation:** (1956) 1 ILR (Cal) 328

**Hon'ble Judges:** Sen, J; Mitter, J

**Bench:** Division Bench

**Advocate:** Jatis Chandra Banerjee, for the Appellant; J.M. Bannerjea, for the Respondent

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### **Judgement**

Mitter, J.

These three Rules are directed against an order of Mr. J. Sarma Sarkar, Presidency Magistrate, Calcutta, dated May 29, 1954, refusing to exempt the Petitioners from appearing in court during their trial in the three cases concerned. The question to be determined concerns the extent of the court's jurisdiction u/s 540A of the Code of Criminal Procedure to dispense with the attendance of an accused when he is being tried with another or more accused persons.

2. It appears that by an order dated March 24, 1954 the learned Magistrate dispensed with the attendance in court of one of the Petitioners.. This order was subsequently vacated on the ground that the jurisdiction of the court to grant such exemption was, by Section 540A, limited to an accused"s incapacity to remain before the court. By the last-mentioned order, which is complained of here, the learned Magistrate also discussed his powers under Sections 206 and 353 Code of Criminal Procedure to dispense with an accused"s attendance in court.

3. Upon our construction of the words "incapable of remaining "before the Court" must depend the jurisdiction of the Magistrate to dispense with the attendance in court of an accused person. In our view, the words "incapable of "remaining" must

refer to an accused's physical incapacity to remain before the court. That being so, no accused is entitled u/s 540A Code of Criminal Procedure to any exemption from appearance in court unless it is proved that he is physically incapable of remaining before the court. Having regard to the language used, it is impossible for us to give the words any other meaning. On the facts of this case, the Petitioners can be said to be only inconvenienced if their attendance is required in court. This is not a case of physical incapacity precluding the Petitioners' attendance in court.

4. Section 205, Code of Criminal Procedure, in terms refers to the power of a Magistrate who issues a summons. He may under Sub-section (1) of Section 205 dispense with the personal attendance of the accused and permit him to appear by his pleader. Sub-section (2) which empowers a Magistrate enquiring into or trying the case to direct the personal attendance of the accused has reference to an exemption already granted by the Magistrate issuing summons. Section 205 Code of Criminal Procedure does not, in our view, confer upon a trial court the power to dispense with the personal attendance of an accused during his trial. Section 353, Code of Criminal Procedure, cannot also be said to confer upon a Magistrate trying a case any power to dispense with the personal attendance of an accused. On this point we have been referred to a decision of the Madras High Court reported in *In re: Ummal Hasanath* ILR (1948) Mad. 498. In that case, Rajamannar, J., (as he then was), was inclined to take the view that Section 353 Code of Criminal Procedure, by necessary implication conferred upon the court a power to dispense with the personal attendance of an accused person. We respectfully dissent from that view, for we cannot see how the section concerned can be said by implication to confer any such power upon a court.

5. That being the position, the only section which, in our view, can be invoked for the purpose, after a trial has begun, is Section 540A, Code of Criminal Procedure, which, as we have said before, must be limited to cases of physical incapacity precluding an accused from appearing or remaining in court.

6. In that view of the matter, the learned Magistrate was right in dismissing the applications for exemption by the Petitioners. We see no reason to exercise our own discretion in the matter u/s 561A of the Code of Criminal Procedure.

7. In the result, the applications fail and the Rules are discharged.

Sen, J.

8. I agree.