

## G.S. Fernandez Vs Emperor

**Court:** Bombay High Court

**Date of Decision:** Aug. 24, 1920

**Acts Referred:** Criminal Procedure Code, 1898 (CrPC) â€” Section 342

**Citation:** AIR 1921 Bom 374 : 59 Ind. Cas. 129

**Hon'ble Judges:** Shah, J; Crump, J

**Bench:** Division Bench

### Judgement

Shah, J.

In this application it has been urged on behalf of the applicant that, after the witnesses for the prosecution were examined, the

accused was not asked to explain the evidence against him as required by Section 342 of the Code of Criminal Procedure. The offense charged

was punishable u/s 352, Indian Penal Code, and the procedure applicable to the case was that provided for the trial of summons cases. The trial

was held by the Second Presidency Magistrate. On behalf of the Crown it is urged that the words of Section 342 are controlled by the words "if

the Magistrate thinks fit" used in Section 245 and "if any" in Section 370, Clause (f) of the Code, and that the Magistrate was not bound to

question the accused as required by Section 342 in the trial of a summons case before convicting the accused.

2. We called for a report from the learned Magistrate as to whether the accused was in fact questioned at the close of the prosecution case u/s

342. We have received a report on that point and the learned Magistrate has also submitted a supplementary report as to the practice followed in

such cases by the Presidency Magistrates and as to the grounds upon which the practice is based.

3. In view of the report and the record of the case, it may be taken as a fact that the accused was not asked any questions after the prosecution

witnesses were examined as required by Section 342 of the Code. We have, therefore, to consider whether it was obligatory upon the Trial

Magistrate in this case to question the accused generally and, if so, what is the effect of the omission upon the present case.

4. These questions must be considered with reference to the provisions of the Code, and it is clear that we cannot allow considerations of

convenience and practice to control the plain meaning of the words used in a Statute, If the interpretation involves any inconvenience or departure

from any practice which may be found to be suited to any class of case?, it would be for the Legislature to consider the matter.

5. The words of Section 342 are clear. The material words are these: For the purpose of enabling the accused to explain any circumstances

appearing in the evidence against him the Court...shall...question him generally on the case after the witnesses for the prosecution have been

examined and before he is called on for his defence." The section occurs in the Chapter relating to general provisions as to inquiries and trials: and

there can be no doubt and it is not disputed that it applies to the Presidency Magistrates as much as to other Courts. The purpose of the provision

is clear, and a general provision of this character, applicable to all Courts and to all inquiries and trials under the Code, ought to be given effect to

unless there are clear words to render it inapplicable to any particular case or class of cases.

6. The provisions mainly relied upon by the Government Pleader as limiting the operation of these words are to be found in the Chapter relating to

the trial of summons cases. It is urged that the provisions of that Chapter leave it to the discretion of the Magistrate to question the accused after

the witnesses for the prosecution are examined. Sections 242 and 245 are relied upon as having that effect. It seems to me that, when the

provisions are examined carefully, they do not involve any such limitation. Section 242 requires that the accused shall be questioned at the

beginning on the particulars of the offence, of which he is accused and that it shall not be necessary to frame a formal charge. Section 244 provides

that if the accused does not admit that he has committed the offence, the Magistrate shall proceed to hear the complainant (if any) and take all such

evidence as may be produced in support of the prosecution and also to hear the accused and take such evidence he produces in his defense.

Section 245 provides that, upon taking the evidence referred to in Section 244, and such further evidence (if any) as the Magistrate may of his own

motion cause to be produced and (if he thinks fit) examining the accused, the Magistrate may acquit or convict the accused. It is clear that Section

244 requires the Magistrate to hear the accused and to record the evidence which he adduces in his defense after the prosecution evidence is

recorded. This is quite consistent with the provisions of Section 342, and does not suggest any inference against the application of the provisions of

Section 342 to the trial of summons cases. Section 245 contains the words "if he thinks fit"; but, having due regard to the context, it appears to me

that the words are used with reference to the further examination of the accused which may become necessary or desirable in virtue of the

evidence which the Court may call of its own motion. When we have a general provision as to the necessity of questioning an accused person to

enable him to explain the evidence against him after the witnesses for the prosecution are examined, the other provisions in the Code should be

read, as far as possible, so as to avoid an inconsistency. A particular provision may control or limit a general provision, but the intention to limit the

operation of the general provision must be clear. The words "if he thinks fit" do not, in my opinion, control or modify the provisions of Section

342, but are capable of being read--and should be read--as serving a sufficient purpose, consistently with the provisions of Section 342. The

suggestion made by Mr. Binning that the words "if he thinks fit" are used in Section 245, as it may not be necessary for the Magistrate to examine

the accused if he is to be acquitted, may afford a further explanation of the use of the words with-out indicating any limitation upon the provisions

of Section 342, On a consideration of the provisions of this Chapter I am unable to hold that the Magistrates are relieved in the trial of summons

cases from the obligation of questioning the accused generally u/s 342 to enable him to explain the evidence against him after the witnesses for the

prosecution are examined.

7. The provisions of Section 370, Clause (f), do not suggest any inference to the contrary. The words "if any" do not in any sense control the

words of Section 342. It has been held by this Court, and it is conceded in the argument, that, in spite of these words, it is obligatory upon the

Presidency Magistrates to examine an accused person u/s 342 in the trial of warrant cases The words "if any" are used in Section 289 of the

Code; and, in spite of these words, the relaxation of the rule contained in Section 342 is not allowed in the trials by Sessions Courts: see Emperor

v. Savalya 9 Bom. L.R. 356 : 5 Cr. L.J. 332; Emperor v. Raju Ahilaji 9 Bom L.R. 730 : 6 Cr. L.J. 74 and Basapa Ningapa v. Emperor 31 I.C.

365 : 17 Bom. L.R. 892 : 16 Cr. L.J. 765. The purpose of Section 370 is to state the particulars to be recorded by the Presidency Magistrates

instead of a judgment as provided in Section 367 and not to lay down whether an accused person shall be questioned or not in a particular case or

class of cases. I do not think that the words "if any" used in Clause (f) of that section can be properly used as modifying the provisions of Section

342 as regards the Presidency Magistrates. If that construction were adopted, Section 342 could be rendered nugatory even in the trial of warrant

cases by Magistrates and trials by Sessions Courts, as the same words are used in Sections 253 and 289 of the Code. It seems to me that the

weakness of the argument urged on behalf of the Crown is indicated by the circumstance that, without a laboured attempt to control or limit the

plain meaning of the words of a section applicable to all trials and inquiries by reference to provisions in different chapters relating to different

purposes, the result contended for by the prosecution cannot be reached. I should say that if the Legislature intended to limit the application of

Section 342 in the sense suggested by the Crown there would have been clear words to that effect in the section itself. In the Chapter relating to

general provisions as to inquiries and trials there are some sections of limited application and the words indicating the limitation are to be found in

such sections.

8. I may mention that I have referred to the different provisions relating to the examination of the accused in the earlier Codes of 1661, 1872 and

1882, and in the Presidency Magistrates Act (IV of 1877). The scheme of the existing provisions as to the examination of the accused was

adopted in the Code of 1882. I do not think that it will serve any useful purpose to examine them in detail: it is sufficient to say that I have not been

able to find any indication therein to favour the contrary view. I am, therefore, satisfied that the accused should have been examined in this case as

required by Section 342.

9. The question relating to the manner in which such examination is to be recorded u/s 464 stands on a different footing. On that point I do not find

any special provision regarding the Presidency Magistrates except that contained in Section 364, sub Section 31 I.C. 365 : 17 Bom. L.R. 892 : 16

Cr. L.J. 765. As regards the recording of evidence, Section 362 makes a special and specific provision for the Presidency Magistrates. It is not

without significance that in Section 364, which is to be found in the same Chapter, no similar differentiation is made as regards the manner of

recording the examination of an accused person by the Presidency Magistrates. In the present case, however, the point is not whether the

examination of the accused was properly recorded or not, but whether the accused was questioned at all after the witnesses for the prosecution

were examined.

10. The omission to examine the accused, as required by Section 342, cannot be condoned. Having regard to the nature of the offence and the

facts of the case, I do not think that it is necessary in the interest of justice to order a re-trial, I would, therefore, set aside the conviction and

sentence and direct the fine, if paid, to be refunded.

Crump, J.

11. The question which arises for decision at the outset in this case is, whether a Presidency Magistrate trying an accused person for an offence

punishable u/s 352 of the Indian Penal Code is bound, before convicting, to examine the accused person in the manner prescribed by Section 342

of the Code of Criminal Procedure.

12. The procedure to be followed by Presidency Magistrates differs from the procedure to be followed by other Magistrates only in those

particulars which are specifically laid down in the Code of Criminal Procedure and, in this respect, the relevant sections are Sections 362 and 370

which prescribe the manner in which the evidence and the judgment respectively shall be recorded. These two sections form exceptions to the

provisions of Chapters XXV and XXVI which deal with the mode of recording evidence in inquiries and trials and with the judgment. Prima facie,

nothing in these Chapters" has any bearing on Section 342 which belongs to Chapter XXIV which contains general provisions as to inquiries and

trials. The words of Section 370(f) "the plea of the accused and his examination (if any)" do not in reality affect the present question, for it cannot

be doubted that there are cases, other than those in which an accused person is convicted, where it is unnecessary to record his examination u/s

342. If, for instance, there is an acquittal u/s 247 or 248 or a discharge u/s 253 there may be no occasion for the examination prescribed by

Section 342. That this is so is plain, if it is remembered that the examination of the accused under that section is obligatory only for the purpose of

enabling him to explain any circumstance appearing in evidence against him. If there is nothing to explain, there is no necessity for the examination.

*Cessante legis ratione cessat et ipsa (sic).*

13. There is, therefore, nothing in the special procedure provided for Courts of Presidency Magistrates which, for the purposes of the present

question, needs to be taken into account. With the exception of the two particulars noted in the preceding paragraph, the procedure for the trial of

summons cases and warrant cases is applicable in those Courts.

14. The present case was a summons case, and the question may, therefore, be generally stated thus: "Is a Magistrate, before convicting an

accused person of an offence triable as a summons case, bound to examine him as required by Section 342?

15. The mandatory portion of Section 342 may be set out as follows: "For the purpose of enabling the accused to explain any circumstances

appearing in the evidence against him the Court...shall...question him generally on the case after the witnesses for the prosecution have been

examined and before he is sailed on for his defence." This is one of the general provisions as to inquiries and trials, as stated in the title of Chapter

XXIV of which it forms part. It has been held by this Court that it applies to trials before a Court of Session in spite of the words "if any" in Section

289: Emperor v. Raju Ahilaji 9 Bom L.R. 730 : 6 Cr. L.J. 74 and Emperor v. Savalya 9 Bom, L.R. 356 : 5 Cr. L.J. 332. It has also been held by

this Court that a Presidency Magistrate cannot convict an accused of an offence triable as a warrant case without recording his examination under

this section: Emperor v. Harischandra 10 Bom. L.R. 201 : 7 Cr. L.J. 194, So far as I am aware, the point has not hitherto been decided with

reference to summons cases.

16. Prima facie, Section 342 is of general application and is based on the salutary principle that an accused person should have an opportunity of

furnishing an explanation before he is convicted. The Legislature has not specifically excepted cases triable under Chapter XX (summons cases)

from its operation, and the general principle on which it is based applies to those cases as strongly as to any other cases. But it has been urged that

the language used in that Chapter excludes the applicability of Section 342. Reliance is placed on the words ""if he thinks fit"" in Section 245(1), It

has been held, as I have already stated, that similar words in Section 289 do not have the effect contended for. It is significant that these words

occur in paragraph (1) of the section which deals with acquittals. We are not now concerned with cases of acquittals. As I have already pointed

out, there may be cases in which the Court finds nothing for the accused to explain, and in such cases it may have a discretion not to examine the

accused. But I am unable to infer from these words that where the Court finds that damning circumstances appear in the evidence against the

accused, there is any discretion in the matter. It is to be remarked that Section 244(1) makes it obligatory on the Magistrate to ""hear the accused

after the evidence for the prosecution is recorded,"" and I find it difficult to hold that, had the Legislature intended to exclude the applicability of

Section 342, they would not have done so in plain terms.

17. The scope of Section 342 has been the subject of discussion in a recent case before the Patna High Court Raghu Bhumi v. Emperor 58 I.C.

49 : 5 P.L.J. 490 : 1 P.L.T. 241 : 21 Cr. L.J. 705. The point there was as regards Sessions trials, but it appears that Sultan Ahmed, J., was

inclined to hold that Section 342 did not apply to the trial of summons cases. The remarks upon this point are, of course, obiter. The distinction

suggested, however, is that the words ""before he is called on for his defence"" occurring in Section 342 are found in Section 256 which deals with

warrant cases, and in Section 239 which deals with Sessions trials, but do not appear in Chapter XX which prescribes the procedure for the trial

of summons cases. With all deference, I am constrained to say that the argument depends upon matters of form rather than of substance. To call

upon an accused person to enter upon his defence is a necessary incident of every trial. Though that precise form of words is not used, the thing

itself is indicated with sufficient clearness in Section 244. A Magistrate trying a summons case must necessarily, under that section, ask the accused

what he has to say, and if he wishes to examine any witnesses, and when a Magistrate does this he does in substance call upon the accused to

enter upon his defence.

18. After giving the matter my best consideration I find no substantial reason to doubt that Section 342 is applicable to the trial of summons cases

to the extent which I have endeavoured to indicate. The omission to comply with the section must necessarily attract the same consequence in

these as in other trials, and it follows, I think, that the illegality vitiates the proceedings.

19. It is not necessary to pronounce upon the merits, but, in view of the trivial nature of the offence, and the circumstances as a whole, no useful

purpose would be served by a re trial. I would set aside the conviction and sentence and direct the fine, if paid, to be refunded.