

CALCUTTA HIGH COURT

Prova Debi

Vs.

Fernandes

F.B. Ref. No.1 of 1961 in Criminal Revn. No.525 of 1960

(S.K. Sen, N.K. Sen, Bhattacharya, D.N. Das Gupta and Amaresh Roy, JJ.)

04.10.1961

JUDGMENT

S.K. Sen, J.

1. Criminal revision Case No.525 of 1960 referred to this Full Bench arises from a case pending in the Court of Sri R.N. Banerjee, Magistrate, 1st Class, Asansol, against the petitioner Prova Debi and two others. In that case on the complaint of the opposite party Mrs. Fernandez, three accused including the petitioner Prova Debi were summoned. Prova Debi being summoned under section 323 of the Indian Penal Code. On her prayer she was permitted to be represented by a pleader under section 205 (1) of the Criminal procedure Code. The case was thereafter transferred to Sri R.N. Banerjee, Magistrate, 1st Class for disposal. When the stage arrived for examination of the accused under section 342 of the Criminal Procedure Code, the learned Magistrate directed the petitioner Prova Debi to appear in person, observing that in view of the ruling of the Calcutta High Court, he could not permit the petitioner to be examined through her pleader and that she must appear personally in Court for examination under section 342 of the Criminal Procedure Code. Against that order this revisional application was filed. When the matter came before a Division Bench, that Bench observed that apparently the learned Magistrate was thinking of the latest decision of the Calcutta High Court on the point, viz., *Dudh Nath Shaw v. State*¹, which followed the decision of another Bench of this Court, *Adeluddin v. Emperor*², but there was a contrary decision by another Bench of this Court viz., *Champa Debi v. Babulal Goenka*³, where the view was taken that there is nothing in section 342 of the Code which requires the Court to compel the personal attendance of the accused for examination after the close of the prosecution Case. The Division Bench also referred to a decision of the Bombay High Court and a decision of the Allahabad High Court taking the same view as was taken in 54 Cal WN 207 : (AIR 1950 Calcutta 161) and referred the case to the Full Bench for decision with the following questions:

1. Where a Magistrate has permitted an accused to be represented by a pleader under section 205 (1) or 540-A (1), is he bound to compel the appearance of the accused for examination under section 342 of the Code or he may exercise his discretion in the matter?

¹ AIR 1958 Cal 431

³⁵⁴ Cal WN 20 : (AIR 1950 Cal 161)

²⁴⁹ Cal WN 537: (AIR 1945 Cal 482)

2. Were the cases AIR 1958 Calcutta 431 and 49 Cal WN 537 : (AIR 1945 Calcutta 482) rightly decided?

2. I propose first to deal with the point with reference to the relevant provisions of the Code. When a Magistrate is satisfied that there is sufficient ground for proceeding he may in appropriate cases issue a summons for the attendance of the accused, as laid down in section 204 of the Code. The prescribed form for a summons is form No.1 of Schedule 5 Of the Code, which runs as follows:

"Whereas your attendance is necessary to answer to a charge of (state clearly the offence charged), you are hereby required to appear in person (or by pleader, as the case may be) before the (Magistrate).....of on theday of Herein fail not".

3. The form shows that when issuing summons the Magistrate may require the attendance of the accused in person or in the alternative by pleader. This is expressly provided by section 205 of the Code which runs as follows:-

"(1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused and, if necessary, enforce such attendance in manner hereinbefore provided."

Thus the power to dispense with the personal attendance of the accused and to permit him to appear by his pleader may be exercised whenever the Magistrate issues a summons in the first instance and only the Magistrate who issues the summons may do so. The terms of section 540-A (1) are wider and apply to all trying Magistrates as well as to Judges, being as follows:

"At any stage of an inquiry or trial under this Code, if the Judge, or Magistrate is satisfied, for reason, to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused".

It may be mentioned that sub-section (1) of section 540-A in the above quoted form was introduced by the amending Act of 1955. When section 540-A was first introduced into the Code in 1923, the terms of sub-section (1) were more limited and gave discretion to the Judge or the Magistrate to dispense with the personal attendance of the accused only when the accused was incapable of remaining before the Court and when there were two or more accused before the Court in the case. But in spite of the more limited scope of the sub-section, the Judge or the Magistrate could exercise the same discretion for dispensing with the personal attendance of the

accused before the Court if he was represented by a pleader.

4. It will be more convenient to deal first with the case where the accused has been permitted to be represented by his pleader under section 205 (1) of the Code. From the terms of section 205 (1) and the form of the summons as set out above, it is clear that the accused may, when so permitted, appear by his pleader to answer the charge. In such a case the pleader represents the accused for every stage in the procedure laid down in the Code for answering the charge. In a summons case the accused after he appears will be told the particulars of the offence of which he is charged and will be asked if he has any cause to show why he should not be convicted (section 242) and if he admits that he has committed the offence, his admission must be recorded as nearly as possible in the words used by him and the Magistrate may convict him on his admission (section 243). When the accused appears by pleader to answer the charge, necessarily the pleader will be asked if he has any cause to show and the pleader must admit or deny the accusation and if he admits the same, conviction may follow, subject to the provisions of section 366 (2) which provides that if the Magistrate proposes to pass a sentence of imprisonment, the accused must be required to attend in person to hear the judgment delivered even if he was permitted to appear by his pleader, but if the sentence be one of fine or if there is acquittal, the pleader may represent the accused even for hearing the judgment. There is no express provision in either section 242 or 243 of the Code indicating that the personal presence of the accused is necessary either to hear the accusation explained or to show cause and plead; indeed if there were, there would be no point in saying that the accused may appear by his pleader to answer the charge.

5. In a warrant case,, as soon as the charge has been framed, the same has to be read out and explained to the accused and the accused is required to plead and if he pleads guilty he may be convicted thereon (section 255). If the accused appears by pleader to answer the charge, it is the pleader who will hear the charge read and explained and will be called upon to plead and the accused may be convicted and sentenced if his pleader pleads guilty, subject again to the provision of section 366 (2) of the Code. There is again no express provision in section 255 of the Code requiring the personal presence of the accused at this stage and therefore, the pleader may fully represent the accused for the purposes of section 255 of the Code. It follows therefore that appearance by pleader involves the performance of all the acts that devolve upon the accused in course of the trial. There are decisions of several High Courts on the point and some of them will be considered in due course. But this position follows from the provisions of the Code itself, including the form of summons prescribed by the Code, permitting the accused in certain cases, to appear by pleader to answer the charge the trying Magistrate to require the personal presence of the accused at any stage and subject also to the terms of section 366 (2) of the Code.

6. It follows as a necessary corollary that when the accused appearing by pleader does not admit the accusation in a summons case and does not plead guilty to the charge in a warrant case, the pleader representing the accused must subject himself to the process of hearing of the case; the hearing includes the examination of the accused under section 342 of the Code; and unless there is something express or implied in the terms of section 342 which makes a personal examination of the accused mandatory, it must be the pleader representing the accused who will give the answers to the questions put by the Court under section 342 of the Code. The terms of section 342 of the Code are as follows:-

"(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without

previously warning the accused, put such questions to him as the Court considers necessary and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defense.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused when he is examined under sub-section (1)."

7. Clearly there is nothing express in the terms quoted above requiring the personal attendance of the accused for examination under section 342. Section 366 (2) of the Code expressly provides that where the accused has been permitted to be represented by his pleader he is required to appear to hear the judgment if the sentence is one of imprisonment; this express provision controls the discretion which a Magistrate has under section 205 (2) of the Code. The absence of such an express provision in section 342 must therefore lead to the inference that for the purpose of examination of an accused under section 342, the discretion of the Magistrate who has permitted his appearance by pleader is not affected. If the Magistrate considers, in view of the circumstances of a particular case, that the personal examination of the accused is necessary, he may in exercise of his discretion under section 205 (2) of the Code direct the accused to appear personally for examination under section 342; but if on the facts of a particular case the Magistrate does not consider a personal examination of the accused necessary, there appears to be no reason why the Magistrate should not exercise his discretion in favor of permitting examination under section 342 by pleader.

8. Next, it has to be considered whether there is anything in the terms of section 342 which necessarily implies that the accused must be examined personally. Sub-section (1) of section 342 provides that the Court may at any stage of the inquiry or trial without previously warning the accused put such questions as the Court thinks necessary. This provision assumes that, the accused is present before the Court throughout the inquiry or the trial. If the accused has been permitted to appear by his pleader, necessarily the accused will not be present before the Court throughout the inquiry of the trial; it is the pleader representing him who will be present before the Court at all stages and necessarily it is the pleader who may be questioned whenever the Magistrate thinks it necessary to do so. To hold that accused must be personally available for questioning at any time that the Magistrate may feel necessary to put a question to him, would be to render the provisions of section 205 altogether nugatory. It has been urged that in any case, for examination at the close of the prosecution case, the accused must be personally present, because such examination is mandatory as shown by the use of the words "shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been examined". But such mandatory provision occurs also in sections 242 and 255. Under section 242, after stating the particulars of the accusation to the accused, he shall be asked if he has any cause to show why he should not be convicted. Under section 255, when the charge has been read out and

explained to the accused, he shall be asked whether he is guilty or has any defense to make. These stages indicated by sections 242 and 255 of the Code are in a sense more important than examination under section 342 of the Code, because on the answer given by the accused under sections 242 or 255 of the Code the accused may straightway be convicted and sentenced. If for the purposes of those sections the accused may be represented by a pleader there is no reason why for purpose of the compulsory examination under section 342 at the close of the prosecution case the accused cannot also be represented by pleader. It therefore follows that when the accused has been permitted to appear by pleader, it is the pleader who may be questioned at any stage without warning and who shall be examined at the close of the prosecution case; there is nothing in the terms of section 342 which by necessary implication requires the personal attendance of the accused for such examination and controls the discretion of the Magistrate under section 205 (2). If in any case, in view of the particular circumstances of a case, the Magistrate thinks it necessary to examine the accused personally, he may require him to appear personally for the purpose; the Magistrate is not compelled to do so in every case because of anything in the terms of section 342 of the Code.

9. It is necessary here to refer to two further arguments in support of the view that section 342 of the Code requires personal examination of the accused. The first argument is based on the wording of section 353 of the Code relating to the taking of evidence. Section 353 provides that except as otherwise expressly provide, all evidence should be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader. It has been suggested that if the term "accused" was intended to include the pleader when the accused has been permitted to appear by pleader, there was no need for making the specific provision in section 353 that when his personal attendance is dispensed with, the evidence shall be taken in the presence of his pleader; and it has been urged that the absence of any specific provision for the examination of the pleader when the personal attendance of the accused has been dispensed with indicates that under section 342 the accused must be examined personally. But then there is no specific provision in sections 242, 243 and 255 of the Code that where the personal attendance of the accused has been dispensed with, the accusation or the charge may be explained to the pleader and the plea taken from him. If it be argued that at those stages also the personal attendance of the accused is necessary, then appearance by pleader to answer the charge would have no meaning, as has been already indicated. At all the various stages which the accused has to go through in answering the charge i.e., in all the various stages of the trial, when the accused appears by pleader it is the pleader who will act for the accused and represent him for all purposes in the absence of express provision to the contrary. It would appear that in section 353 the specific mention of evidence being taken in presence of the pleader representing the accused, has been made only to make it clear that the pleader representing the accused must remain present in Court during the examination of the witnesses in connection with the trial of the accused; he cannot be permitted to go away on other business and appear only when he has to say something or do something in the case.

The second argument rests on the difference in wording between section 364 on one side and sections 360 and 361 on the other. Section 364 of the Code requires that in taking down the statement of the accused the question and answers shall be recorded in full in the language in which the accused is examined or in the language of the Court or in English and such record shall be shown or read to him and if he does not understand the language of the record it shall be interpreted to him in a language which he understands and the record shall be signed by him. Section 360 provides that after taking down the evidence of a witness it shall be read to him in

the presence of the accused, if in attendance, or his pleader if he appears by pleader. Section 301! provides that the evidence shall be interpreted in a language understood by the accused or by his pleader when he appears by his pleader. Thus in sections 360 and 361 it is specifically provided that the evidence shall be read out in the presence of the pleader and interpreted in a language understood by a pleader when the accused is represented by a pleader, whereas in section 364 in connection with the record of the statement of the accused there is no specific mention of the pleader who may represent the accused. The argument therefore, is that this difference shows that the accused has to be personally examined under section 342 of the Code and it is only the recording of the evidence and reading out and explaining the same that may be done in the presence of the pleader representing him. But as in the case of the recording of the evidence under section 353 of the Code, it must be held that specific mention of the pleader representing the accused in connection with reading out and interpretation of the evidence is made to indicate that the pleader representing the accused must be present when the evidence is read out and interpreted i.e., he must be present and understand the proceedings throughout and should not go away on other business. To hold otherwise would be to nullify the discretion vested in the Magistrate under section 205 (2) of the Code and defeat the provision that the accused may in certain circumstances appear by pleader to answer the charge against him.

10. When the personal attendance of an accused has been dispensed with under Section 540-A (1), the above argument in so far as it is based on the consideration that the accused has appeared by pleader to answer the charge against him, does not apply. It is for this reason that in sub-section (1) of section 540-A, the law requires the Court to be more careful when dispensing with the personal attendance of an accused who is represented by a pleader. Under section 205 (1) the Magistrate does not have to record his reasons; it is sufficient that the Magistrate sees reason to dispense with personal attendance of the accused and permit him to appear by pleader. If however, the attendance of an accused is dispensed with under section 540-A (1) the Court has to record the reasons and he must be satisfied that the personal attendance of the accused before the Court is not necessary in the interests of justice. In other words, the Judge or the Magistrate must be careful to see that the absence of the accused in person at any stage of the trial does not prejudice the accused in any way. Whenever the Judge or the Magistrate thinks it necessary in the interests of Justice that the accused should be personally present, he must- direct the personal presence of the accused. But subject to these limitations, it must also be held that for the purpose of examination of such an accused under section 342 of the Code, the Magistrate or the Judge may exercise his own discretion, for there is nothing in the terms of Section 342 either express or implied which controls such discretion on the part of the Magistrate or the Judge. The express provisions of Section 366 (2) of the Code must be deemed to control the discretion of the Judge or the Magistrate under section 540-A (1) as under section 205 (2) of the Code. But subject to that provision it is for the Court to satisfy itself whether at any stage it may safely dispense with personal attendance of the accused and this includes examination of the accused under section 342 of the Code.

11. Next, I propose to review briefly the case-law on the point. Before considering the various decisions of this High Court it will be useful to note briefly some decisions of other High Courts and ascertain how the other High Courts have decided the point.

12. One of the earliest decisions on the point is that of the Judicial Commissioners of Sind in the case *Emperor v. Jamal Khatun*⁴, In that case it was held that section 205 of the Code allows the

accused to appear by pleader and such appearance involves the performance of all acts which devolve upon the accused in the course of the trial, such as answering the examination by the Court under section 342 or pleading or refusing to plead to the charge under section 255 of the Code. In coming to the above conclusion, the Court referred to the form of the summons and to the terms of section 366 (2) of the Code, pointing out that that section contained the only restriction on the discretion conferred on the Magistrate under section 205 (2) of the Code.

13. Next, there is a decision of the Rangoon High Court taking the same view, viz., *Maung Po Nyein v. Haka Singh*⁵, in which it was held that where the personal appearance of the accused has been excused under section 205 of the Code, there is no objection to allowing the accused to leave it to their pleader to make statements under section 342, if any, on their behalf and their personal appearance should not be insisted upon. In arriving at this decision, reference was made to the terms of section 366 (2) and section 205 (2) of the Code; it was also observed that section 342 was intended to safeguard the interest of the accused and give them an opportunity to explain the circumstances appearing against them, but they might be permitted to do so by a pleader.

14. The Bombay High Court has taken the same view. In the case of *Dorabshah Bomanji v Emperor*⁶, it was held that having regard to the provisions of sections 205, 340, 366 (2) of the Code, it is clear that in a case where the Court has allowed an accused to appear by pleader, it must be taken that such appearance involves the performance of all acts that devolve upon the accused in the course of the trial, unless the Magistrate thinks it necessary or desirable that the accused himself should be present for any particular purpose, such as examination by the Court under section 342 or pleading to a charge under section 255; and in such a case there is not sufficient ground for holding, in spite of the fact that sections 242 and 243 speak of the accused only, that the pleader may not make the necessary answers and plead guilty or not guilty on his behalf. In support of their conclusions, their Lordships referred to the Sind decision 19 Ind Cas 544 : 14 Cri LJ 272 (Sind) and also to an English decision *R. v. Thomson*⁷, and the corresponding provisions of the Summary Jurisdiction Act, under which the case 1909-2 KB 614 was tried, pointing out that the provisions of law were similar to those contained in sections 242 and 243 of the Code; but it was held that the accused might be permitted to appear by counsel and plead through the mouth of the counsel. In deciding this case their Lordships distinguished an earlier decision of the Bombay High Court, *Emperor v. Sur Singh Mathuradas*⁸, pointing out

⁴19 Ind Cas 544 : 14 Cr LJ 272 (Sind)

⁶ AIR 1926 Bom 218 : 27 Cr LJ 440,

⁵ AIR 1927 Rangoon 73

⁷(1909) 2 KB 614

⁸6 Bom LR 861

that in that particular case, the accused was present at the time when the pleader gave his plea and therefore the decision could not apply to a case falling under section 205 of the Code.

15. In a later decision of the Bombay High Court, *Emperor v. Jaffar Cassam Moosa*⁹, to which Beaumont, C.J., was a party, the decision in *Dorabshah Bomanji's* case, AIR 1928 Bombay 218 : 27 Cri LJ 440 was approved and it was held that section 342 of the Code must be read subject to the provisions of section 205; and that when the Magistrate exercises the powers given to him by Section 205 of dispensing with the personal appearance of the accused and permits, him to appear by his pleader, the Magistrate is not bound to question the accused personally.

16. The Madras High Court has also adopted the same view, vide the decision *In re, C.M. Raghavan*, AIR 1950 Madras 814 where it was held that it is for the Magistrate to consider

whether it is necessary to direct the personal attendance of the accused, who was exempted under section 205, for questioning under Section 342 of the Code and that the omission to examine the accused personally does not vitiate the trial. In coming to the above conclusion the decisions of other High Courts were reviewed, including an earlier decision of the Madras High Court to which reference has been made before us viz., In re, Naianmalini Konan, AIR 1921 Madras 679 where it was held that an omission to question the accused generally on the case after the prosecution witnesses had been examined would make the conviction of the accused illegal and that a written statement filed by the accused could not be substituted for the examination of the accused under section 342 of the Code which was mandatory. Chandra Reddy, J., in deciding AIR 1950 Madras 814 pointed out that in that case the question whether failure to examine the accused would vitiate the trial when his presence had been dispensed with under section 205 of the Code, was not considered and that therefore, the decision in Naianmalini Konan's case, AIR 1921 Madras 679 could not be taken as a decision to the contrary.

17. The Orissa High Court is of the same view, vide the decision *Rusi Biswal v. Nakhyatra Malini Debi*¹⁰, That is a decision of Panigrahi, C.J. and he held that it is not obligatory on the Magistrate to require the personal attendance of the accused, who has been exempted under section 205, at any stage including examination under section 342; and if the Magistrate is satisfied that the examination of the Muktear on behalf of the accused is sufficient, the non-examination of the accused personally could not render the trial illegal.

18. The Madhya Pradesh High Court has taken the same view, vide the case *State v. Tarachand Anand*¹¹, which is a decision by Nevaskar, J. It was held in the case that the view taken by some Courts that in any case the presence of the accused ought to be enforced when the accused is to be examined under section 342, does not appear to be correct, as it proceeds upon the wording of section 342 alone and does not take into account the provisions pertaining to exemption and also the provisions of section 366 (2) of the Code. This decision was made after reviewing many of the relevant decisions of other High Courts on the point; and the decisions which evoked the above noted criticism by the learned Judge, include a decision of the Allahabad High Court viz., *Ishwardas v.*

⁹ AIR 1934 Bom 212: 35 Cr LJ 1035

¹¹ AIR 1957 Mad Pra 219

¹⁰ AIR 1954 Oris 65

*Bhagwandas*¹²,

19. There are some decisions of the Allahabad High Court taking the opposite view; AIR 1934 Allahabad 693 (2) : 35 Cri LJ 879 cited above is one of them. That was a decision by Bennet, J. and the learned Judge after referring to the term and purpose of section 342 of the Code observed as follows :-

"If the Legislature had intended to admit a statement made by an Advocate in the place of the statement made by the accused, the Legislature would have made a provision to that effect. In my opinion, sub-section (2) of Section 205 is inserted partly for the purpose of enabling the Court to act as it has acted in the present case and to require the personal presence of the accused for the purpose of making the explanation under section 342 A statement made by an Advocate is merely hearsay and the Court may ask

questions from the Advocate on which the Advocate has no instructions. Moreover, the Court may desire to note the appearance of the accused and his manner when the accused replies to the questions asked".

Bennet, J., referred to the decision, of the Ran-goan High Court, AIR 1927 Rangoon 73 and the Bombay High Court, AIR 1926 Bombay 218 and expressed his dissent from the above decisions. But after expressing the above view, the learned Judge observed as follows:-

"It is for the Bench to satisfy themselves as to whether such charges have been made out or not; for that purpose the Bench is entitled to send for the accused if they consider that their personal explanation is necessary".

By making such observation, Bennet J., practically conceded that the Bench or the Magistrate could exercise discretion in the matter whether or not personal examination of the accused under section 342 of the Criminal Procedure Code was necessary and the decision cannot therefore be regarded as a decision strongly taking the opposite view, although Mr. Goswami appearing for the opposite party has strongly relied on this decision.

20. Another decision of the Allahabad High Court made in the same year is *Hikmat Ali v. Emperor*¹³, That was a decision of a Bench of two Judges, but there was no general discussion in that case on the point of law with which this Full Bench is concerned. There were two accused before the Magistrate in that case and one of them was ill one day and was allowed to be represented by his pleader and when the pleader was questioned on behalf of that accused, he replied that he knew nothing about the facts of the case. In the circumstances, it was held that it was impossible to hold that there had been no failure of justice and the case was remanded for retrial. This decision does not really support the opposite view, viz., that the personal appearance of the accused cannot be dispensed with for the purpose of examination under section 342 of the Code, because it appears that if the pleader who was defending the particular accused had not disclaimed all knowledge

¹² AIR 1934 All 693 (2) : 35 Cr LJ 879

¹³ AIR 1934 All 389 : 35 Cr LJ 784

the facts of the case but given some reply to the questions, their Lordships would have been prepared to hold that there had been compliance with the law. Further, the presence of the accused had been dispensed with in that case under section 540-A (1) as it stood before 1955 amendment and when the pleader expressed inability to answer the questions, the Magistrate should certainly have seen that for the ends of justice, the presence of the accused could not be dispensed with for the purpose of examination under Section 342.

21. Another decision of the Allahabad High Court which has been cited is *Samresh Singh v. State*¹⁴, That decision however does not at all deal with a case where the appearance of the accused has been dispensed with under section 205 or 540-A of the Code. On reading that judgment it is clear that the accused was present before the trial Court and was also questioned under section 342 of the Criminal Procedure Code; but with reference to the facts of the particular charge of criminal breach of trust of which he was convicted, he was not specifically questioned. It was held that in the absence of specific question on the facts of the charge on

which he was convicted, the conviction was bad and the fact that a written statement had been filed by the accused would not cure the defect. This decision therefore is not really material for the purpose of the point before the present Bench. It may be mentioned in passing that the Supreme Court in the case, *K.C. Mathew v. State of Travencore-Cochin*¹⁵, deprecated the view that because of insufficient examination of the accused under section 342, it must always be held that the accused had been prejudiced. It was observed that if the accused is not afforded the opportunity by the trial Court to explain fully the circumstances against him when questioned under section 342 at the trial Court, he is entitled to ask the Appellate Court to place him in the same position as he would have been in, had he been properly examined; in other words, the accused is entitled to ask the Appellate Court, which is the ultimate Court of fact, to take the explanation that he would have given in the first Court, into consideration when weighing the evidence, in just the same way as he would have done if it had been there all along; but if he does not take up that position at the appellate stage and complains of prejudice for the first time in the Supreme Court, the inference is strong that there has been no real prejudice.

22. In the latest case decided by the Allahabad High Court on the point, a view has been taken completely in consonance with the view taken by the Judicial Commissioners of Sind, the Rangoon High Court, the Bombay High Court and the Madras High Court. I refer to the case *Ram Singh v. State*¹⁶, it was a decision by Desai, J. and the learned Judge observed as follows:-

"There is nothing in the language of section 342 (1) to suggest that an accused whose personal attendance has been exempted under section 205 (1) must be examined after the witnesses for the prosecution have been examined. The exemption from the personal attendance contemplated by section 205 (1) is for the whole duration of the trial; it follows that an accused can be exempted from personal attendance even on the day on which the examination under section 342; is to take place. It is for the accused himself if he chooses to make a personal

¹⁴ AIR 1953 All 781

¹⁶ AIR 1959 All 623

¹⁵ AIR 1956 SC 241

statement to appear in Court; there is nothing to compel the Court to summon him for the purpose of examination. It is provided in sub-section (2) of section 205 that the Court may in its discretion at any stage of the proceedings, direct his personal attendance. This discretion is quite inconsistent with the idea of any obligation of the Court to direct his personal attendance for any purpose, even for the purpose of examining him under section 342."

23. Only the Punjab High Court has taken the opposite view. In the case *Sadhuram v. Mt Amar Kaur*¹⁷, a decision by Falshaw, J., it was observed as follows:-

"The provisions of section 342 of the Criminal Procedure Code appear to be intended to apply only to an accused in person and even if the personal attendance of an accused has been dispensed with generally under section 205, he must at any rate attend in person after the close of the prosecution evidence for the purpose of answering the questions which the Court is bound to put to him at that stage. The mandatory provisions of section 342 override the discretionary power given by a Court under section 205."

The learned Judge referred to the decisions of Bombay, Madras, Orissa and Madhya Pradesh High Courts but did not follow those decisions; he preferred to follow the decision of the Calcutta High Court in the case AIR 1958 Calcutta 431, the correctness of which decision is under examination in this Full Bench Reference.

24. The Kerala High Court in a recent case, *Karanjia v. Chellappan Pillai*¹⁸, after noticing decisions of various High Courts on the point, including the decisions AIR 1959 Punjab 228 and AIR 1958 Calcutta 431, came to the conclusion that when the accused is exempted from personal appearance under section 205 (1) of the Code, it is not obligatory on the part of the Magistrate to enforce the personal attendance of the accused for the purpose of examination under section 342; and that it is for the Magistrate to consider in each particular case whether it is necessary to do so; the view that section 342 makes it mandatory to examine the accused personally was considered and rejected.

25. This completes the review of the decisions of other High Courts on the point at issue in this Full Bench Reference case. It is clear that the Judicial Commissioners of Sind and the Rangoon, Bombay, Madras, Madhya Pradesh, Orissa, Allahabad and Kerala High Courts are all in favor of the view that the Magistrate may exercise his discretion in the matter of personal examination of the accused when the accused has been permitted to be represented by a pleader and that the Magistrate is not compelled to examine the accused personally under section 342 of the Code; only the Punjab High Court has taken the opposite view.

26. We now come to the decisions of the Calcutta High Court. The earliest cases cited viz. In the matter of Kiron Chandra Roy, 6 Cal WN (Notes) 59 and *Debendra Nath Sen v. Nagendra Nath Mitra*¹⁹, have only laid down that the Magistrate has the discretion to permit an accused to be represented by pleader under the provisions of section 205 of the Code; they do not deal directly with the questions

¹⁷ AIR 1959 Pun 228

¹⁹14 Cal WN (Notes) 131

¹⁸ AIR 1960 Ker 383; 1960 Cr LJ 1597

whether for the purpose of examination under section 342 of the Code, the personal appearance of the accused is necessary. In the next case *Rajrajeswari Debi v. King Emperor*²⁰, where the learned Magistrate had refused a prayer of the accused for being permitted to be represented by a pleader, a Division Bench of the High Court granted her prayer and observed that the accused should be permitted to appear at the trial by her pleader subject to having to appear before the Court to hear the sentence passed should the trial end in conviction. In other words, although it is not clearly expressed in the judgment, the decision was to the effect that section 366 (2) of the Code controls section 205 (2), but section 342 of the Code does not control section 205 (2). This decision was no doubt one under the inherent jurisdiction of the High Court because it was not a case covered by S.205, where exemption may be granted only in a case where summons was issued for the appearance of the accused and section 540-A of the Code in its present form was not on the Statute book at the time. But the decision shows that the learned Judges of the Bench did not consider personal presence of the accused necessary for the purpose of examination under Section 342. The next decision viz., In re, Sukhalata Gupta, 21 Cal WN (Notes) 168, is a decision under Section 205 of the Code. In that case, the petitioner who was one of the accused in a case under section 420 of the Indian Penal Code pending before the Chief Presidency Magistrate, had been permitted to be represented by a pleader, but when the stage arrived for

taking of the plea of the accused the Chief Presidency Magistrate directed her personal appearance; and against that order the High Court was moved. A bench of this Court consisting of Chitty and Richardson, JJ., accepted the argument that there is no law which makes it imperative or an accused to appear personally and plead and directed in view of Section 366 (2) that her personal appearance be dispensed with till the conclusion of the trial, her plea being taken through her pleader and her written statement if any being accepted as embodying of her plea.

27. The next decision is one of the two decisions of which correctness is under examination by this Full Bench viz., 49 Cal WN 537 : (AIR 1945 Calcutta 482). In this case, one of the accused had been permitted to be represented by a pleader under section 540-A of the Code. It was held by a Bench of this Court consisting of Lodge and A.N. Sen, JJ., that although section 540-A of the Code permits a Court in special cases to proceed with a trial in the absence of an accused, it does not permit the Court to dispense with his presence for examination under section 342 and to examine his pleader under that section. This decision however gave no reason except the observation that the personal presence of the accused for examination under section 342 was imperative and that there was nothing in section 540-A to the contrary.

28. Next, there are two decisions by Chunder and Guha, JJ., taking the opposite view. These decisions are 54 Cal WN 207 : (AIR 1950 Calcutta 161) and *Anilabala Devi v. Chairman, Kandi Municipality*²¹, In the first of these two cases, it was held as follows:

"Section 342 does not govern section 205 of the Code; it also does not govern section 540-A and in a case in which the accused is represented by a pleader in accordance with a permission granted by the Court, it is not necessary to call upon the accused to be personally present to be examined under section 342 of the Criminal Procedure Code and failure to call upon the accused for being examined

²⁰17 Cal WN 1248

²¹ AIR 1950 Cal 350

will not vitiate the trial". The learned Judges referred to the terms of sections 205, 540-A, 342 and 366 (2) and observed that only Section 366(2) expressly governs the sections 205 and 540-A and that section 342 does not govern those sections; they also referred to the decision 49 Cal WN 537 : (AIR 1945 Calcutta 482) but did not agree with that decision and they avoided a reference to the Full Bench by pointing out that that was a decision under section 540-A whereas the case before them was a case where permission had been granted under section 205 of the Code.

29. In the second case AIR 1950 Calcutta 350, the question of personal appearance at the particular stage of examination under section 342 of the Code did not arise directly, though by necessary implication, personal appearance at that stage was dispensed with. The Magistrate had refused the prayer of respectable pardahnashin lady to be represented by a pleader under section 205 of the Code and this conduct of the Magistrate was criticized and representation by a pleader under section 205 of the Code was directed for the entire case, as reference to the cases 17 Cal WN 1248 and 21 Cal WN (Notes) 168 shows.

30. Thereafter, in 1954, a Bench of the Court in the case *Ramchandra Agarwalla v. State*²², made a reference to the Full Bench for decision of the question whether personal examination of an accused is necessary under Section 342 of the Code when he has been permitted to be represented by a pleader with further question which of the two cases AIR 1945 Calcutta 482 : 49 Cal WN 537 and 54 Cal WN 207 : (AIR 1950 Calcutta 161), was correctly decided. This reference was made on 22nd July, 1954. A Full Bench of this Court by a decision dated 13th July 1955 pointed out that no order had been passed in the case exempting the accused from personal attendance under either section 540-A or 205 of the Code and therefore, it could not be said that the accused was properly represented by pleader. The reference to the Full Bench was therefore held to be infructuous. Subsequently, by an order dated 29th July, 1955 the Division Bench to which the case was referred back, remanded the case for fresh trial in accordance with law; and incidentally an observation was made that personal examination of the accused was necessary under Section 342 of the Criminal Procedure Code; but since it had been decided in the case that the accused had never been properly represented by a pleader, the trial was bad for that reason alone and a retrial was necessary from the Stage at which the accused failed to appear in Court; and in the circumstances the observation made by the Bench relating to necessity or otherwise of the personal examination of the accused under section 342 of the Code must be held to be an obiter.

31. Next, there is the decision AIR 1958 Calcutta 431 by J.P. Mitter and Debabrata Mookerjee, JJ. In that case it was held that section 342 provides for the personal examination of the accused and that the Court has no jurisdiction to dispense with the personal examination of an accused even though he has been permitted under section 540-A to be represented by a pleader. It was held that there was nothing in sections 205 and 540-A to encourage the opposite view. J.P. Mitter, J., in his judgment relied on the decision 49 Cal WN 537 : (AIR 1945 Calcutta 482) and also on the observations made by a Bench of this Court in Cr. Rev. No. 1287 of 1953 (Cal). I have already pointed out that in 49 Cal WN 537 : (AIR 1945 Calcutta 482) no reason was given by the learned

²² Cr. Revn. No. 1287 of 1953 (Cal)

Judges who decided the case except to say that section 342 was mandatory and that the observation on the point in *Ramchandra Agarwala's* case, Cri. Revn. No. 1287 of 1953 (Cal) was an obiter.

32. In *Dudhnath Shaw's* case, AIR 1958 Calcutta 431 J.P. Mitter, J., referred to the decision of Chunder and Guha JJ., in 54 Cal WN 207 : (AIR 1950 Calcutta 161) and mentioned that in a subsequent case, *Tapan Kumar Roy v. State*²³, decided by Chunder, J., sitting singly, he appeared to have taken a view different from that in *Champa Debi's* case, 54 Cal WN 207: (AIR 1950 Calcutta 161). In *Tapan Kumar's* case, 57 Cal WN 135, Tapan Kumar was one of the two accused convicted under Section 83 Indian Penal Code and some defense witnesses were examined to prove the defense contention. The boy had been permitted to appear by a Mukhtar, who was questioned on behalf of the boy under section 342. Before Chunder, J., the point was taken that this examination of the Mukhtar instead of the boy vitiated the trial Chunder, J. observed that he was not prepared to go as far as that; he held that it was only a wrong exercise of his discretion by the Magistrate. The Mukhtar when examined under section 342 gave the boy's age as 13 and the Magistrate relied on this admission and ignored the defense evidence to the contrary Chunder, J. observed that "no one can make an admission on behalf of an accused person in a criminal case except the accused himself. It is no doubt true that the observation is

too wide; certainly, when a pleader or mukhtar appears to answer the charge on behalf of an accused, he can also make an admission binding the accused. Chunder J. appeared to have overlooked his own decision in Champa Debi's case, 54 Cal WN 207 : (AIR 1950 Calcutta 161) and Anilabala's case AIR 1950 Calcutta 350. But on the facts of the particular case before him, it was correct that this Magistrate could not act on the so-called admission of age by the Mukhtar representing the accused. A person is not competent to prove and therefore to admit his own age and the Mukhtar appearing for the boy could not admit the age of the boy he was representing. The Magistrate should have seen that the so-called admission was against the defense taken in the case and required the personal attendance of the accused, in order to test the evidence of the defense witnesses. So it was a case of wrong exercise of his discretion by the. Magistrate, as Chunder J. observed; and except for the broadly worded proposition that none but an accused can make an admission against himself, there is nothing in the decision in Tapan Kumar's case, 57 Cal WN 135 that goes against the view adopted in Champa Debi's case, 54 Cal WN 207 : (AIR 1950 Calcutta 161) and Anilabala's case.

33. Debabrata Mookerjee, J. in his concurrent judgment in AIR 1958 Calcutta 431 relied on the terms of Section 342 itself and stated that it was clear that the provisions could not lend countenance to the view that the examination of an agent of the accused was contemplated under this section. He observed that Sections 205 and 540-A contained provisions enabling the Magistrate direct; the personal presence of the accused whenever necessary and the reasoning was that in view of the terms of Section 342 of the Criminal Procedure Code it was necessary that the personal appearance should be required at the stage of examination under Section 342 of the Criminal Procedure Code. His Lordship also referred with approval to observations of Rankin, J. in the case *Promotha Nath v. Emperor*²⁴, where Rankin, J. observed as follows:

²³57 Cal WN 135

²⁴27 Cal WN 389: (AIR 1923 Cal 470)

"The intention of the statute is that at a certain stage in the case, the Court itself shall put aside all counsel, all pleaders, all witnesses, all representatives and shall call upon an individual accused with the authority of the Court's own voice to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating."

The learned Judge also referred to the fact that Section 342 occurs in the Chapter of the Code relating to general provisions as to enquiries and trials and expressed the opinion that this section would prevail over Section 205 which appears in the Chapter relating to the commencement of proceedings before a Magistrate and Section 540-A which occurs in the Chapter headed "Miscellaneous".

34. In my opinion, unless it is so expressly provided, the position of a particular section in a particular Chapter cannot show that it is to prevail over the provisions contained in another section occurring in another Chapter of the same Code or Act. The provisions themselves have to be considered. I have already indicated that I can find nothing in the terms of Section 342 of the Code which either expressly or by necessary implication indicates that personal examination of the accused is mandatory even in a case where the accused has been permitted to appear by pleader for the purpose of answering the charge against him. Debabrata Mookerjee, J., referred to the words "without previously warning the accused" used in Section 342 (1) and observed that

the Legislature would not have used the words unless it had clearly in mind that the question should be put directly to the accused and not to his lawyer and agent. But as I have indicated already, the Court may put question at any stage without previously warning the accused, if the accused has to be personally examined. It means that he would have to be present throughout the trial and therefore the order of the Court permitting representation by pleader would become nugatory. His Lordship also observed that under Sub-Section (2) of Section 342 the accused shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them and thought that this immunity granted to the accused could not be extended to his agent or his pleader. But if the agent or the pleader has been permitted to represent the accused for the purpose of the trial, there is no reason whatever why this immunity should not extend to the agent or pleader also.

35. As to the observations of Rankin, J., they are no doubt, entitled to great respect, but I may point out that the observation rather expresses a sentiment viz., that the accused must be personally heard by the Judge who tries him. When an accused is as of right defended by a lawyer under Section 340 of the Criminal Procedure Code and Article 22 of the Constitution, any statement which he makes in answer to questions put under Section 342 of the Criminal Procedure Code is generally what he has been advised by his lawyer to make, the idea of personal examination of the accused by the Judge can hardly be considered of much importance. After the decision of Rankin J., in 27 Cal WN 389 : (AIR 1923 Calcutta 470), other Benches repeated the dictum that under Section 342 of the Code the accused has to be examined personally e.g., *Emperor v. Alimaddi Naskar*²⁵ and *Messrs. Bepari v. Emperor*²⁶, In the first of these cases, however, the question before the Court was whether a formal question in general terms e.g. what is your defense, was sufficient compliance with the provisions of Section 342 of the Criminal Procedure Code.

²⁵29 Cal WN 231 : (AIR 1925 Cal361)

²⁶29 Cal WN 939 : (AIR 1926 Cal 430)

Such a formal question in general terms was held sufficient, as it gave the accused an opportunity of making his statement of defense "with his own lips", "in compliance with the mandatory provision of Section 342 of the Criminal Procedure Code". On behalf of the opposite party the observations regarding making a statement with his own lips and reference to Section 342 as the mandatory provisions of Section 342 of the Criminal Procedure Code, are relied upon. In 29 Cal WN 939 : (AIR 1926 Calcutta 430), although the accused were present in Court at a Sessions trial the accused were not examined; at least no record was made of their statement in the form prescribed by Section 364 of the Code. It was held that this made the trial a bad one.

36. In none of the cases, 27 Cal WN 389 : (AIR 1923 Calcutta 470), 29 Cal WN 231 : (AIR 1925 Calcutta 361) and 29 Cal WN 939 : (AIR 1926 Calcutta 430) was the Court concerned with the question whether the examination of the agent or pleader under Section 342 was sufficient where the accused had been permitted to be represented by a pleader under Section 205 or Section 540-A of the Code or under the inherent jurisdiction of the High Court. In all these cases the accused was present in Court; in Promotha Nath's case, 27 Cal WN 389 : (AIR 1923 Calcutta 470) and Messrs Bepari's case, 29 Cal WN 939 : (AIR 1926 Calcutta 430), though the accused were present in Court, they were not orally examined as required under Section 342 of the Code. Undoubtedly, therefore, there was irregularity in the trial, which was considered to be a

fatal irregularity. Accordingly, these decisions do not really help in arriving at a correct answer to the question before this Full Bench. They have been cited only to show that in several decisions of this Court, the Court has observed that personal examination of the accused is mandatory under Section 342 of the Criminal Procedure Code. There is, however, nothing in the terms of Section 342 of the Code to support this view that personal examination of the accused is necessary in all cases. In interpreting the words of a Statute, the Court must be careful not to import any new word into the section which may radically alter the meaning. The words as they stand in the section must be interpreted. While it was held in the three decisions cited that from the terms of the section, personal examination of the accused appears to be intended, other decisions have already been referred to where equally eminent Judges have taken the contrary view, viz., that there is nothing in the section which requires the personal examination of the accused in all cases, even if he has been allowed to be represented by a pleader. It may further be observed that Rankin J. in 27 Cal WN 389 : (AIR 1923 Calcutta 470) observed as follows:

"In the case of an accused who is in no difficulty in understanding the proceedings, question put to his counsel in his hearing and answered by his counsel in his hearing may perhaps be taken to some extent as a compliance with Section 342 though it is not a full compliance with the section".

Why his Lordship regarded personal examination of the accused generally as compulsory, was that frequently the trial of the accused was carried to a language which the accused did not understand and the accused was not allowed to depose on oath on his own behalf. It is no longer correct that the accused generally does not understand the language in which the trial is carried on; when it is carried on in language which the accused does not understand, the proceedings are always interpreted to him. The accused may depose now on oath in his own defense under Section 342-A.

37. However though some of the reasons given by Rankin J. no longer have the force which they had at the time when the observations were made, it still remains true that generally in a trial the accused must be examined personally under Section 42 when there is no order under Section 265 or 540A of the Code dispensing with his presence and permitting representation by a pleader. As already stated, the decision of Rankin J. does not deal with a case when the accused was allowed to be represented by a pleader. The present tendency of the Legislature is to permit the accused to be represented by a pleader for all purposes, particularly in petty cases and not to compel him to come to Court personally in all cases. In this connection I may refer to the provisions of Section 130 of the Motor Vehicles Act, 1939, which provides that a Court taking cognizance of an offence under the Motor Vehicles Act 1939, shall, unless the offence is an offence specified in Part A of the Fifth Schedule, state upon the summons that the accused may appear by pleader and not in person, or may by a specified date prior to the hearing of the charge plead guilty to the charge by registered letter and remit to the Court such sum not exceeding twenty-five rupees as the Court may specify. The second alternative permits a person accused of a petty motoring offence to remit the fine specified in the summons by Money Order and send a letter by registered post admitting the charge. In the "alternative he has to be given the option to appear by pleader and it is clear from the terms of the section that the pleader will represent the accused throughout the trial, the offences being generally punishable by a fine only. Similarly, when a Magistrate is trying comparatively petty cases e.g. summons cases and he has the power under

Section 205 or 540-A of the Code to exempt an accused from personal appearance, there is no reason why the Magistrate should compel the accused to appear in person particularly in a case where he proposes to pass a sentence of fine only. If he proposes to pass a sentence of imprisonment, no doubt he is bound under Section 366 (2) to require the personal attendance of the accused to hear the sentence, but otherwise there is no reason why the personal appearance of the accused should be insisted on and why the Magistrate should not be allowed to exercise the discretion which he has both under Section 205 (2) and 540 (1) of the Code. As to the point that the pleader or agent may not be able to answer all the questions which may be put by the Court under Section 342 of the Code, that could only come about in complicated cases and then the Magistrate should exercise his discretion to require the personal presence of the accused to answer the questions. But there is no reason why the Magistrate should be compelled in every case to require the personal attendance of the accused for the purpose of examination under Section 342 of the Code. In my view there is nothing in the terms of Section 342 which restricts or governs the discretion of the Magistrate under Section 205 (2) and Section 540A (1) of the Code.

38. In my opinion therefore, the answer to question No.1 should be that a Magistrate may exercise his discretion in the matter and the answer to question No.2 should be that in so far as the cases AIR 1958 Calcutta 431 and 49 Cal WN 537: (AIR 1945 Calcutta 482) took the contrary view, they were wrongly decided.

39. A question has been raised by Mr. Goswami appearing for the opposite party whether there is a legal order in the present case under Section 205 (1) of the Code, permitting the petitioner to appear by pleader. Mr. Goswami has pointed out that though summons was issued originally by an order of the Sub-Divisional Magistrate dated 29th May, 1959, as the accused did not appear on the next date i.e. 26th June, 1959, the learned Sub-Divisional Magistrate issued warrants with a bail of Rs. 200 each and on the following day 26th June, 1959 two of the accused Manik Chand Sharma and Chandra Sekhar appeared in Court and were released on bail and a petition was submitted for permitting the 3rd accused viz., the petitioner Prova Debi, to appear by pleader under Section 205 of the Criminal Procedure Code. The learned Magistrate granted such permission, holding that though issue of warrant had been ordered no warrant had actually been issued, as two of the accused appeared on the next day; and in the circumstances, he cancelled the order for the issue of warrant against the accused and permitted the appearance of the accused by pleader. Mr. Goswami has urged firstly, that since the order permitting appearance by pleader was not made at the time when the summons were initially issued, the order was bad. In support of this proposition Mr. Goswami has referred to the case *Aditya v. Jogendra*²⁷, where the view was expressed that an order under Section 205 (1) can only be made at the initial stage when the summons is issued. But the terms of Section 205 (1) do not support the view that the permission can be granted only when the summons is issued. Subsection (1) of Section 205 provides that whenever a Magistrate issues a summons, he may, if he sees, reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader. It follows from this that the Magistrate may make such an order when issuing the summons or in a case where he has issued a summons. Mr. Goswami has drawn our attention to the decision of this Court in *Kalidas Banerji v. State*²⁸, where it was held as follows :

"Section 205 Cri. P.C. 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 inquiring into or trying the case to direct the personal attendance of an accused has reference to an exemption already granted by the Magistrate issuing summons. Section 205 Cri. P.C. does not in our view confer upon a trial Court the power to dispense with the personal attendance of an accused during his trial."

The above observations only show that the power under Section 205 (1) can only be exercised by the Magistrate who issues the summons; they do not show that the Magistrate who issues the summons may exercise the power under Section 205 (1) only when he is issuing the summons. He may do so at any subsequent stage. This view is also supported by another decision of the Calcutta High Court viz., 14 Cal W N (Notes) 131 where it was held that Magistrate may exercise his powers under section 205 as often as may be necessary. It is of course only the Magistrate issuing the summons who may exercise the power and not a Magistrate to whom the case is subsequently transferred for inquiry or trial; but it is in any case clear that the Magistrate who issues the summons may exercise the power under the section not only at the stage when he is issuing the summons in the beginning, but also at any stage, at any rate before the trial begins. Further, it frequently happens that a Magistrate at the initial stage when issuing the summons does not exercise the discretion as to allowing exemption from personal attendance, because he does not then know the status or the desire of the accused; after

²⁷ AIR 1948 All 393

²⁸ AIR 1954 Cal 576

the summons has been issued, a petition on behalf of the accused may be filed for exemption from personal attendance, stating the grounds for such exemption; if the Magistrate is satisfied that the grounds are reasonable, he may, grant such exemption. Such order has necessarily to be passed subsequent to the original order issuing the summons. The only limitation is that the Magistrate who issues the summons can alone exercise the power and not any other Magistrate. In the present case, the Sub-Divisional Magistrate, who originally issued the summons, himself granted exemption before he transferred the case to another Magistrate. Accordingly, the order was quite correct as to the point that the issue of a warrant had been ordered, that makes no difference, because the order for issue of the warrant was recalled on the very next day and no warrant was issued. In this connection reference may be made to the decision *Jagdish v. Emperor*²⁹, where it was observed that where a warrant was issued but cancelled and then a summons issued, the Magistrate could exercise the powers under Section 205 (1) of the Code. Thus it must be held that the petitioner was legally permitted to be represented by a pleader under Section 205 (1) of the Code. Hence this reference to the Full Bench is competent; and the question referred must in my opinion be answered in the way I have already indicated.

N.K. Sen, J.

40. The main question for decision by the Full Bench is where a Magistrate has permitted an accused to be represented by a Pleader under section 205(1) or 540-A (1), is he bound to compel the appearance of the accused for his examination under Section 342 of the Code or if he may exercise his discretion in the matter. Incidental to this question is the further question were the case of AIR 1958 Calcutta 431 and the case of 49 Cal WN 537 : (AIR 1945 Calcutta 482) rightly decided.

41. In order to properly appreciate the point for our decision Sections 205 and 540-A have to be fully examined. The provisions of Section 205 of the Code have not undergone any material change up-to-date. So far as Section 540-A is concerned it has a career. Act X of 1882 did not contain this section. Act V of 1898 which came into force on 22-3-1898 did not originally contain this section. It was by Section 151 of Act 18 of 1923 which came into force on 2-4-1923 that Section 540-A was first inserted. Section 540-A was then in the following terms :

"540-A (1) At any stage of an enquiry or trial under this Code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that any one or more of such accused, is or are incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such enquiry or trial in his absence and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused".

42. It was by Section 109 of the Code of Criminal Procedure (Amendment) Act XXVI of 1955 that the provisions contained in Sub-Section (1) of Section 540-A were amended and a new sub-section as is found now was substituted. Section 540-A as amended now reads as follows :

²⁹ AIR 1940 All 178

"At any stage of an enquiry or trial under this Code if the Judge or Magistrate is satisfied for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, the Judge or Magistrate, may, if the accused is represented by a pleader, dispense with his attendance and proceed with such enquiry or trial in his absence and may, at any subsequent stage of the proceedings, direct the, personal attendance of such accused".

Noticeable differences are that in the amended Sub-Section (a) it is no longer necessary that there should be 2 or more accused before the Court (b) that any one or more of such accused is or are incapable of remaining before the Court.

43. In order to determine the question before us it is necessary to bear in mind the significant omissions made in the amended sub-section as compared to what it originally contained.

44. The decisions of this Court on the point whether the presence of the accused is imperative for his examination under Section 342, Cri. P.C. are not uniform. The cases decided by this Court may be noticed first. So far back as 1902 Prinsep and Stephen, JJ. in 6 Cal WN (Notes) 59 held that the personal attendance of the accused in that case should be dispensed with in terms of Section 205, Criminal Procedure Code and the trial should proceed in such a manner as was thought proper. Here the personal attendance of the accused was dispensed with under Section 205 of the Code. Their Lordships did not direct that the accused was to appear at any stage of the trial. The same view was taken by Stephen and Carnduff, JJ. in 1910 in the case of 14 Cal WN (Notes) 131. In this case also personal attendance of the accused was dispensed with under Section 205 of the Code without any limitations. Imam and Chapman JJ. in 1913 in the case of 17 Cal WN 1248 on the prosecution of Rohini Kumar Chatterjee, held that the personal attendance of the accused ladies were to be dispensed with. They were allowed to appear by their pleader/pleaders before the Court to hear the sentences passed should the trial end in a

conviction. It was further directed that should the case be committed to the Court of Sessions the personal appearance of the ladies may be dispensed with till the Sessions Judge passed his orders. In this connection it may be mentioned that Section 366(2) of the Code provides that the accused whose personal attendance during the trial had been dispensed with need not appear in Court to hear the sentence if it was one of fine only or where he was acquitted. In either of the cases the judgment may be delivered in the presence of the pleader Chitty and Richardson JJ. in 1917 in 21 CWN (Notes) 168 followed the decisions in the cases of Debendra Nath Sen 14 Cal WN (Notes) 131 and Raj Rajeshwari Debi, 17 Cal WN 1248 cited above and ordered that the personal attendance of the accused was to be dispensed with until the conclusion of the trial and directed that the plea be taken through her pleader and in case she filed a written statement the same might be accepted as embodying her plea. In this case their Lordships directly mentioned that even in taking her plea she might be allowed to be represented by a Lawyer.

45. Coming to more recent times Chunder and Guha JJ. in 1949 held in the case of AIR 1950 Calcutta 350 that the conduct of the Magistrate in insisting upon dragging a respectable lady to Court in a petty case cannot but be seriously condemned. The case was one under Section 349/500 Bengal Municipal Act. Their Lordships referred to the earlier decisions in the cases of Raj Rajeshwari Devi 17 Cal WN 1248 and Sukhalata Gupta, 21 Cal WN (Notes) 168 which they followed. The same learned judges in the same year in the case of 54 Cal WN 207 : (AIR 1950 Calcutta 161 held that there was nothing in Section 342 of the Code of Criminal Procedure which required the personal attendance of the accused. They further held that Section 342 of the Code did neither govern Section 205 nor Section 540A of the Code and in a case in which the accused was represented by a pleader in accordance with the permission granted by the Court, it was not necessary to call upon the accused to be personally present to be examined under Section 342 of the Code. Their Lordships followed the earlier decisions in the cases of Kiran Chandra Roy 6 Cal WN (Notes) 59; Devendra Nath Sen, 14 Cal WN (Note) 131, Raj Rajeshwari Devi, 17 Cal WN 1248 and Sukhlata Gupta, 21 Cal WN (Noted) 168 referred to abate. They also held that the decision of this Court in the case of 49 Cal WN 537 : (AIR 1945 Calcutta 482) decided by Lodge and Sen JJ. was not correctly decided. A reference would be made to the case of 49 Cal WN 537 : (AIR 1945 Calcutta 482) hereafter. Mr. Justice Mitter and Mr. Justice S.K. Sen had to consider the provisions of Section 540A in the case of AIR 1954 CM 576 : 1954 Cr. L.J. 1664. In that case the question before their Lordships was the interpretation of the words "incapable of remaining in Court" as appearing in Section 540-A before its present amendment. So far as Section 205(1) was concerned, their Lordships said that it did not confer upon a trial Court the power to dispense with the personal attendance of an accused during his trial. As regards Section 540A their Lordships observed that it was the only Section which could be invoked for the purpose after a trial has begun and that the power must be limited to cases of physical incapacity precluding the accused from appearing or remaining in Court. As I have pointed out earlier Section 540A as amended now does not contemplate the physical incapacity of remaining in Court of an accused person, therefore, this case is practically of no assistance in determining the question before us. The above are the important Calcutta decisions which favoured the view that personal attendance of the accused is not necessary for his examination under Section 342 of the Code.

46. A contrary view namely, that Section 342 Criminal Procedure Code envisages the personal examination of the accused has been taken in some cases of this Court (In the case of 27 Cal WN 389 : (AIR 1928 Calcutta 470) which arose out of a difference of opinion between Newbould

and Sahrawardy JJ. in a case under Section 500 Indian Penal Code, Rankin J. referred to the advisability or necessity of a personal examination of the accused and S.342 Criminal Procedure Code. In that case the accused was present in Court but was allowed to file a written statement. In connection with the filing of the written statement Rankin J. observed that it was not proper compliance with the requirements of S.342 Criminal Procedure Code. In delivering his judgment he expressed his views in the following words which are very often quoted in Courts :

"In this Country it often happens that a prisoner is tried in a language which for one reason or another he understands indifferently well and for that reason as well as for other equally grave reasons the intention of the Statute is that at certain stage in the case, the Court itself, shall put aside all counsel, all pleaders, all witnesses, a representatives and shall call upon an individual accused with the authority of the Court's own voice to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating".

In citing this case in connection with the exemption granted to an accused person under either Section 205 or under Section 540A Criminal Procedure Code, a very significant fact is often lost sight of namely, that in that case the accused was personally present in Court. This decision, therefore, does not seem to be an authority for the proposition that an accused person must be personally examined under Section 342 Criminal Procedure Code. The observation of Sanderson C.J. in the case of *Mozahur Ali v. Emperor*³⁰, that S.342 Criminal Procedure Code contemplates that the object of the examination of the accused under Section 342 Criminal Procedure Code is to enable him to explain any circumstance appearing in evidence against him has never been disputed in any case. What Sanderson C.J. emphasised in that case was that the last part of S.342 Criminal Procedure Code clearly indicated that time at which the Court shall question the accused generally on the case, was after the prosecution case was completed and before the accused person was called on for his defense. Their Lordships were not called upon to decide whether a personal examination of the accused was in fact imperative under Section 342, Cri. P.C.

47. In the case of 29 Cal WN 231 : (AIR 1925 Cal 361) Newbould and Mukerjee JJ. had only to consider the nature of the examination to be made under Section 342 Criminal Procedure Code. Their Lordships made it clear that the Court must point out to the accused the salient points appearing in the evidence against him in a succinct form and he must be asked to explain them if he wished to do so. It was in this connection that the forceful observation by Rankin J. in the case of 27 Cal WN 389 : (AIR 1923 Calcutta 470) was quoted with approval. There was no question in that case about the accused being absent during his examination under Section 342 Cri P.C.

48. In the case of *Rez Mahammad v. Emperor*³¹, Newbould and Chakrabarti, JJ. had to consider the nature of the examination to be made under Section 342 Criminal Procedure Code. Their Lordships in considering that point held that questions like "what is your plea?" would satisfy the provisions of S.342 Criminal Procedure Code. Their Lordships then observed that the object of the section has been pointed out By Rankin, J. in Promotha Nath Mukhapadhy's case, 27 Cal WN 389 : (AIR 1923 Calcutta 470). In this case also the accused person was not absent during the examination under Section 342 Criminal Procedure Code.

49. In 1925, in the case of 29 Cal WN 939 : (AIR 1926 Calcutta 430) Newbould and B. B. Ghose, JJ. set aside an order of conviction on the ground that the provisions of S.342 Criminal Procedure Code had not been complied with at all. This was a case of failure to record the statement of the accused under Section 342 Criminal Procedure Code and as such is of no assistance for coming to any conclusion regarding the presence of the accused during his examination.

50. The case of 49 Cal WN 537 : (AIR 1945 Calcutta 482) was decided in 1945 by Lodge and Sen, JJ. Their Lordships had to consider the question of the legality of

³⁰27 Cal WN 99 : (AIH 1923 Cal 196)

³¹ AIR 1926 Cal 424

examining the pleader of the accused under Section 342 Criminal Procedure Code where the accused had been granted exemption to appear under Section 540A Criminal Procedure Code. Their Lordships held that there was no provision for examining the pleader of the accused under Section 342 in any case. Lodge, J. further observed that the Magistrate exercised his discretion wrongly in that case in trying one Kamaruddin in his absence Sen, J., only observed that one of the stages where the accused was to be personally present was when he was required to be examined in accordance with the provisions of Section 342 of the Code. In his Lordship's opinion the Court could not dispense with the presence of the accused at that stage. It must be observed that His Lordship gave no reason for his saying so except that the language of Section 342 Cr P.C. did not expressly provide for the examination of the pleader of the accused under Section 342 Criminal Procedure Code. Chunder J. in the year 1952 in the case of 57 Cal WN 135 had to consider the decision in the case of 49 Cal WN 537 : (AIR 1945 Calcutta 482). The case before his Lordship was the admission of a Mukhtear of the accused person as to the age of the accused. His Lordship held that no one could make an admission on behalf of the accused person in a criminal case except the accused himself. The case of 49 Cal WN 537 : (AIR 1945 Calcutta 482) having been cited to him his Lordship, observed that even in that case Lodge J. pointed out that it was "a wrong exercise of discretion of the Magistrate" to do so. His Lordship then again pointed out that a wrong exercise of discretion and vitiating of the entire trial are two different things. If it was a wrong exercise of discretion it will have to be seen whether on the facts there has been a miscarriage of justice and it would be unnecessary to go into the question of law more fully in the case. It seems to me that Chunder J. was of the view that not to examine an accused person personally would be in some cases only a wrong exercise of discretion and nothing more.

51. The latest reported decision on the point is the case of AIR 1958 Calcutta 431. The case was decided by J.P. Mitter and Debabrata Mookerjee JJ. The case before their Lordships was one where the accused was permitted under Section 540A to be represented by a lawyer. This lawyer was examined under Section 342 Criminal Procedure Code in the absence of the accused. The accused moved this Court against his conviction and took the plea that he should have been personally examined under Section 342 Cri. P.C. Mr. Justice Mitter held that the provisions of S.342 Cri P.C. were mandatory and that the section provided for the personal examination of the accused and not any one representing him. His Lordship then observed that his view was supported by the case of 49 Cal WN 537 : (AIR 1945 Calcutta 482) as well as by an unreported decision of this Court in the case of Cri. Rev. No.1287 of 1953 (Cal). His Lordship then pointed out that in the unreported case of Ram Chandra Agarwalla, Cri. Revn. No.1287 of 1953 (Cal) his Lordship himself sitting with S.K. Sen, J. took the view that the case of 49 Cal WN 537 : (AIR 1945 Calcutta 482) had been rightly decided and the case of 54 Cal WN 207 : (AIR 1950

Calcutta 161) was wrongly decided. Their Lordships being of that view made a reference to the Full Bench for a decision being F.B. Reference No.1 of 1954. The Reference, however, turned out to be incompetent and proved infructuous and their Lordships of the Full Bench refused to deal with the questions referred to on the ground that they did not arise. They, therefore, remitted the case to the Division Bench to be disposed of in accordance with law. It was pointed out that in the case that was referred to the Full Bench the mukhtear of the accused was examined under Section 342 Criminal Procedure Code although there was no application by the accused person asking for exemption from personal attendance nor was there any order recorded by the magistrate under Section 540A. On the case coming back to the Division Bench, their Lordships in view of the facts and circumstances of that case ordered that the case be retried from the stage of the petitioner's examination under Section 342 Criminal Procedure Code.

52. In Dudnath Shaw's case, AIR 1958 Calcutta 431 Debabrata Mookerjee, J. held that there was nothing in Section 205 or Section 540A of the Code which could encourage the view that the Court could dispense with the attendance of the accused even for purposes of examination under Section 342 of the Code. Even then Debabrata Mookerjee, J. referred to Sub-Section (2) of S.205 Criminal Procedure Code which provided that the Magistrate enquiring into or trying the case may in his discretion, at any stage of the proceeding, direct the personal attendance of the accused and, if necessary, enforce his attendance in manner provided in the Code. His Lordship, thereafter, referred to the case of 27 Cal WN 389 : (AIR 1923 Calcutta 470) and concluded that a vicarious examination of the accused was not the true purpose of Section 342 of the Code.

53. In none of the cases cited above sub-sec (2) to S.205 Criminal Procedure Code had been given the attention due to it. By this sub-section, a discretion was given to the Magistrate to direct the personal attendance of the accused if he thought it was necessary. It does not appear to me that this discretion was given to the Magistrate without a purpose. The legislature certainly intended that in a proper case where the matter for decision was of a trivial nature, the Magistrate was to exercise his discretion to either dispensing with the personal attendance of the accused or to direct him to appear personally.

54. The cases of other High Courts on the point may now be considered. Maung Ba J of the Rangoon High Court in 1926 in the case of AIR 1927 Rangoon 73 was clearly of the view that where the Magistrate had granted an exemption under Section 205 Criminal Procedure Code, a pleader representing him could be examined under Section 342 Criminal Procedure Code.

55. Panigrahi C.J. of the Orissa High Court held in the case of AIR 1954 Orissa 65, that it was not obligatory on the Magistrate to direct the personal attendance of the accused who had been exempted under Section 205 Criminal Procedure Code at any stage including examination under Section 342 Criminal Procedure Code. If he is satisfied that the examination of the Mooktear on behalf of the accused was sufficient, the non-examination of the accused personally would not render the trial illegal. In coming to that conclusion, the learned C.J. relied on the decision in the case of *Emperor v. Jaffar Cassum Moosa*, decided by Beaumont C.J. and Barlee J. of the Bombay High Court in 1934 reported in AIR 1934 Bombay 212 : 35 Cri LJ 1035. The case of AIR 1927 Rangoon 73 was also cited with approval.

56. The Madhya Pradesh High Court was also of the view that the exemption granted to an accused person was a matter of discretion for the learned Magistrate. This was held by Nevaskar

J. sitting singly in the case of AIR 1957 Madhya Pradesh 219. The learned Judge held that it was a matter of discretion for the Magistrate. Cases may be of such sort that enforcing the personal attendance may work injustice to the accused or hardship to him. It was further held that the view that in every case the presence of the accused sought to be there when he is to be examined under Section 342, Cri. P.C. did not appear to be correct as it proceeded upon the wording of Section 342 Criminal Procedure Code alone and did not take into account the provisions pertaining to exemption and provisions of Section 366 (2) Criminal Procedure Code. Reliance was placed on Beaumont C.J.'s decision in the case of AIR 1934 Bombay 212 and on the case of 54 Cal WN 207 : (AIR 1950 Calcutta 161) and also on the Madras decision in AIR 1950 Madras 814 Chandra Reddy, J. of Madras High Court in AIR 1950 Madras 814 cited above also shared the same view as the Rangoon High Court did and also relied upon the decision in AIR 1934 Bombay 212 and also upon another Bombay decision by Fawcett and Madgavkar JJ. in the case of Dorab Shah Bomanji. AIR 1926 Bombay 218 : ILR 50 Bombay 250.

57. The two Bombay decisions in the case of AIR 1926 Bombay 218 and AIR 1934 Bombay 212 cited above clearly held that the personal attendance of the accused who had been granted an exemption was not mandatory for his examination under Section 342 Criminal Procedure Code. Dorab Shah's case, AIR (1926 Bom 218) was decided in 1925. It was held that where an accused person was permitted to appear by a pleader it was open to him to appoint a private person to appear in his stead and plead and do other acts on his behalf in the case against him and it was equally open to the Court to permit such private person to represent the accused as a pleader. This case was followed by Beaumont C.J. in Jaffar Cassem's case AIR 1934 Bombay 212 cited above and their Lordships relied upon the case of Dorab Shah, AIR 1926 Bombay 218 and the Rangoon case of Mong Po Nyien AIR 1927 Rangoon 73. In this case permission was given under Section 205 of the Code to the accused to appear through a pleader. In repelling the argument that the Magistrate ought to have insisted on the accused appearing in person in order that he might be questioned under Section 342 Criminal Procedure Code, their Lordships held that where the Magistrate exercised the power given to him by Section 205 Criminal Procedure Code of dispensing with the personal attendance of the accused and permitted him to appear by his pleader, the Magistrate was not found to question the accused personally. In their Lordship's view Section 342 Criminal Procedure Code must be read subject to the provision of Section 205 Criminal Procedure Code.

58. Allahabad High Court does not seem to be unanimous in its decision as to whether the personal attendance of the accused was mandatory for his examination under Section 342 Criminal Procedure Code. The latest decision is by Desai J. in 1959 in the case of AIR 1959 Allahabad 623. In this case his Lordship followed the two Bombay decisions and the Rangoon decision cited above and also a decision of the Judicial Commissioner's Court, Sind in the case of *Emperor v. Jamal Khatun* decided by Mr. Piatt J.C. and Mr. Croude AJC reported in 19 Ind Cas 544 (Sind). Desai, J., was of the view that the exemption from the personal attendance contemplated by Section 205 (1) Criminal Procedure Code is for the whole duration of the trial and if followed that an accused could be exempted from personal attendance even on the date on which his examination under Section 342 Criminal Procedure Code is to take place. It was for the accused himself if he wished to make a statement to appear in Court. Desai J. then referred to Sub-Section (2) of Section 205 Criminal Procedure Code and pointed out that this discretionary provision was quite inconsistent with the idea of any obligation under the Court to direct his personal attendance for any purpose, even for the purpose of examining him under Section 342

Criminal Procedure Code. The earlier Allahabad decisions are the cases of AIR 1934 Allahabad 389; AIR 1934 Allahabad 693 (2); and, AIR 1953 Allahabad 781. In Hikmat Ali's case AIR 1934 Allahabad 389 the pleader who was representing the-accused was asked to make a statement and he replied that he knew nothing about facts of the case. It was in that connection that it was held that S.537, Criminal Procedure Code could not be called in aid to cure the irregularity. Iswar Das's case. AIR 1934 Allahabad 693 (2), was decided by Bannet, J. sitting singly. His Lordship in that case held that the statement made by an advocate was merely hearsay. His Lordship then dissented from the Rangoon decision and also from the Bombay decisions. In Samresh Singh's case, AIR 1953 Allahabad 781, Beg, J. was considering the question of a proper examination under Section 342, Criminal Procedure Code. It does not appear from the report of this case that the accused was absent and a statement was made on his behalf in his absence. The three Allahabad cases cited above are, therefore, no authority for the proposition that an accused person has to be personally present in Court for being examined under Section 342 Criminal Procedure Code although he has been granted an exemption.

59. Most of the above decisions were referred to by P. Gobinda Menon, J. in the case of AIR 1960 Kerala 383. On a review of the decision placed before him his Lordship was of the view that even apart from the decisions a reading of section 205, Criminal Procedure Code itself indicated that it was not mandatory that the accused need be examined in person in a case where his personal attendance had been exempted under Section 205, Criminal Procedure Code.

60. In the case of *Nana Sadoba v. Emperor*³², although his Lordship expressed himself by saying that putting of questions to the accused under Section 342. Criminal Procedure Code should be by the Judge himself, his Lordship did not have to consider whether such questions, if put by the Judge to the person authorized by the accused when the accused himself had been granted an exemption from appearance would not satisfy the requirements of the section.

61. It now remains to consider the Punjab decision in the case of AIR 1959 Punjab 228 and decided by Falshaw, J. sitting singly. In this case his Lordship was of the view that the accused must attend in person for the purpose of answering the questions which the Court was bound to put to him. His Lordship held that the mandatory provisions of S.342, Criminal Procedure Code would override the discretionary powers given to the Court under Section 205, Criminal Procedure Code. The Bombay, Madras, Orissa, Madhya Pradesh. Rangoon and Calcutta decisions to the contrary were not followed.

62. Reference has been made at the Bar to the decisions of the Supreme Court in the case of 1956 SCA 175 : AIR 1956 Supreme Court 241 and to the case of *Tilkeswar Singh v. State of Bihar*³³, In *Tilkeswar's* case, 1956 SCA 331 : AIR 1956 Supreme Court 238, which was decided in December, 1955. Ayyar, J. in dealing with the examination of the accused under Section 342, Criminal Procedure Code as it was made in that case held that where the accused wanted to file written statements and did file statements which were very elaborate and furnished the answer to all the points raised in the prosecution evidence, it could not be said that there was any ground for interference unless prejudice was established. His Lordship said "it is no doubt true that Section 342 contemplates an

³² AIR 1938 Nag 283

³³ (1956) SCA 331 : (AIR 1956 S C 238)

examination in Court and the practice of filing statements was to be deprecated". His Lordship then went on to say that "it is nothing unusual for the accused to prefer filing statements instead of answering questions under Section 342 lest they should suffer by inadvertent admissions or by damaging statements". In case of K.C. Mathew, AIR 1956 Supreme Court 241, which was also decided in December, 1955, Bose, J. had to deal with S.342, Criminal Procedure Code where the examination of the accused was not as full or as clear as it should have been. His Lordship observed that there was no prejudice caused in that case and went on to say

"after all the only person who can really tell us whether he was in fact prejudiced is the accused; and if there is real prejudice he can at once state the facts and leave the Court to judge their worth and if the attitude of the accused whether in person or through the mouth of his counsel is I don't know what I would have said. I still have to think it up" the Court is entitled to conclude that he has nothing of value which he can disclose".

In both the cases their Lordships of the Supreme Court had only to consider the adequacy or otherwise of the examination under Section 342, Criminal Procedure Code and the filing of a written statement. In none of these cases their Lordships expressed any opinion as to the effect of an examination of a representative of the accused where the accused had been granted an exemption. On the other hand, the only question that their Lordships considered important was whether or not the accused was prejudiced in any way. Their Lordships only deprecated the filing of a written statement but never held that where an accused was present such a written statement was not to be accepted. When a written statement which was a complete one answering all the circumstances appearing against the accused was held to be acceptable in preference to his oral statement, I cannot find any reason why a statement made through the mouth of a counsel instead of that of the accused should not be acceptable. In my view the compulsion of the Court to examine the accused personally yields to the desire of the accused himself. It is for him to say whether he would make a personal statement or would leave it to his counsel to do so on his behalf or he would prefer to file a written statement. The other cases cited at the Bar viz., *Ajmer Singh v. State of Punjab*³⁴, *Karnail Singh v. State of Punjab*³⁵, *Moseb Kaka v. State of West Bengal*³⁶, have no direct bearing on the issue before us. These cases merely deal with instances of inadequacy of the examination under Section 342 Criminal Procedure Code.

63. Examining the plain language of the two Sections 205 and 540A of the Code it is difficult to see why they should be interpreted to mean that the personal examination of the accused under Section 342 Criminal Procedure Code, was obligatory. The language of Section 342 Criminal Procedure Code, in my view also cannot be held to mean that the examination referred to therein was the examination of the accused himself and not of the accused as represented by the pleader in any circumstances. Sub-section (2) of Section 205 Criminal Procedure Code, gives an unfettered discretion to the Magistrate to permit the accused to appear by a pleader. It must be observed that such a permission is given usually at the request of the accused himself. Under Section 540A the Court may dispense

³⁴1953 SCA 329 : AIR 1953 SC 76

³⁶1956 SCA 754 : AIR 1956 SC 536

³⁵1954 SCA 339 : AIR 1954 SC 204

with the personal attendance of the accused at any stage of an enquiry or trial. The words used in both the sections nowhere put any limitation on the powers of the Magistrate to dispense with the personal attendance of the accused during his examination under Section 342 Criminal Procedure

Code. On a reference to Section 242 Cr, P.C., it will be apparent that in a case where at the time of issuing summons, the Magistrate dispenses with the personal attendance of the accused and permits him to appear by his pleader in accordance with Sub-Section (1) of Section 205 and the pleader appears, the Magistrate was to state to the pleader the particulars of the offence with which the accused is charged. Whoever appears will have to state if he has any cause to show why he should not be convicted. If he pleads not guilty, then the trial will proceed. If, on the other hand he showed no sufficient cause as to why he should not be convicted, the Magistrate may convict him accordingly. If it be held that the personal examination of the accused is necessary then in a summons case the Magistrate would be powerless to grant the accused any exemption from attendance in accordance with Section 205 Criminal Procedure Code. The powers given to the Magistrate under Section 205 Criminal Procedure Code would then become meaningless and he will have no right to exercise the said powers which have been given to him without any limitation. It is but unreasonable to think that the accused who had himself obtained permission for personal exemption from appearance in Court should in case an adverse order is passed against him, be allowed to argue that he should have been personally examined. It was for him to decide whether in view of the accusations made against him, he should personally appear before the Magistrate and explain the circumstances appearing against him or he should leave the matter to his lawyer or representative. When the accused chooses to be represented by somebody the Court cannot presume that such representative will be doing something contrary to the instruction given to him by the person on whose behalf he was appearing. If the representative goes against the instructions given to him, it will be a matter to be decided in a proper case as between the parties. Even in such a contingency it will be unreasonable to conclude that the personal attendance of the accused is to be insisted upon in apprehension of such a contingency. That in proper cases the accused should be exempted from appearance so that the disposal of criminal cases are not unduly delayed was in my view clearly the object in the insertion of Section 540A in its present form by Act 28 of 1955.

64. An examination of the provisions of the Calcutta Municipal Act would also support the view that in proper cases where it was unnecessary to enforce the attendance of the accused, the Court was to proceed with the trial in spite of the absence of the accused before the Court. Under Section 581 of the Calcutta Municipal Act, 1951, the Magistrate could hear and determine the case in the absence of the accused. See.581 of the C.M. Act is in the following terms :

"If any person summoned to appear before a Magistrate to answer a charge of an offence against this Act or against any rule or bye-law made there under fails to appear at the time and place mentioned in the summons, or on any date to which the hearing of the case may be adjourned, the Magistrate may, if

- (a) service of summons is proved to his satisfaction and
- (b) no sufficient cause is shown for the nonappearance of such person, hear and determine the case in his absence."

It will be observed that many offences under the Calcutta Municipal Act are punishable with the imprisonment and/or to a heavy amount of fine.

65. Under the Motor Vehicles Act, 1939 in all offences not specified in Part A of the fifth schedule of the Act, the accused could appear by pleader and not in person. He may even plead guilty to the charge by a letter under registered post. This is provided for in Section 130 of the

Motor Vehicles Act, 1939 as amended by Act 100 of 1956.

66. Although these are special Acts containing special provisions, yet the Court is not absolved from the duty of examining the accused person under Section 342 Criminal Procedure Code, whether he is present in person or by an agent. Comparing the provisions contained in these Acts, where the accused on conviction is liable to pay a fine and in some cases to suffer rigorous imprisonment, the only reasonable conclusion is that in proper cases the accused may appear by a pleader or an agent even during his examination under Section 342 Criminal Procedure Code. There will still be a discretion left to the Magistrate to call for the personal attendance of the accused where circumstances demand it and it is always open to the accused himself to appear in Court should he himself think that he has any statement to make to the Magistrate personally.

67. I am, therefore, of the view that the discretion given to the Magistrate for exempting an accused from personal attendance in Court under Sections 205 and 540A Criminal Procedure Code, is one which has not been taken away either expressly or by implication by Section 342 of the Code. In my view, the question No.1 before the Full Bench must be answered by saying that where a Magistrate has permitted an accused to be represented by a pleader under See 205 (1) Criminal Procedure Code, or 540A (1) he is not bound to compel the appearance of the accused for examination under Section 342 of the Code of Criminal Procedure and he may exercise his discretion in the matter. The answer to question No.2 is that the cases of 49 Cal WN 537 : (AIR 1945 Calcutta 482) and AIR 1958 Calcutta 431, were not rightly decided.

Bhattacharya, J.

68. With due respect I must say I am unable to agree with the view that a "pleader" within the meaning of Section 4 (1) (r) of the Criminal Procedure Code may be examined by a Court under the provisions of Section 342 of the Criminal Procedure Code instead of the accused himself.

69. No useful purpose will be served by tracing here the history of the examination of an accused in successive Codes - of 1861 (Act XXV), of 1869 (Act VIII), of 1872 (Act X), of 1882 (Act X). Section 342 of the last mentioned Act has remained unaffected by the amendments of 1898, 1923 and subsequent years. Details have been mentioned in 29 Cal WN 231 : (AIR 1925 Calcutta 861). The Legislature, as the wordings of Section 342 go to show, definitely intended to invest Section 342 with unquestionable solemnity. Sub-section (1) is divided into two parts. It says, first, that for the purpose of enabling the accused to explain any circumstances against him, the Court may put such questions to him as are considered necessary. The second part makes it mandatory for the Court to question the accused generally on the case at a certain stage. The importance of examining the accused under Section 342 cannot be over emphasized. The observation of Rankin, J. in ILR 50 Calcutta 518 : (AIR 1923 Calcutta 470) is well worth quoting in this connection :

"In this country it often happens that a prisoner is tried in a language which for one reason or another he understands but indifferently well and for that reason as well as for other equally grave reasons the intention of the statute is that at a certain stage in the case the Court itself shall put aside all counsel, all pleaders, all witnesses, all representatives and shall call upon each individual accused with the authority of the Court's own voice to take

advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating. In the case of an accused, who is in no difficulty in understanding the proceedings, a question addressed to his counsel in his hearing and answered by his counsel in his hearing may perhaps be taken in certain circumstances as a compliance with the section. It is not a full compliance with the section but I say nothing whatever to create any more trouble than is absolutely necessary in any case of that character. What is necessary is that the accused shall be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defense, if he is willing to make one with his own lips."

With all respect, it will not do to say, in view of the analysis of the section which I propose to give hereafter, to dismiss the above observations by merely saying that these are expressions of fine sentiment only. In 29 Cal WN 231 : (AIR 1925 Hal 381), the object of the section which was so forcibly pointed out by Rankin J. was stressed by Mukherji, J. It was observed inter alia,

"The Court should not only have the power to point out to the accused the circumstances appearing in the evidence which require explanation, but that it must out of fairness to the accused exercise that power in such a way that the accused may know what points in the opinion of the Court require explanation, failure or refusal to give which will entitle the Court to draw an inference against him."

70. It was further pointed out that the provisions of Section 342 were not intended merely for the benefit of the accused. Mukherji, J. emphasised the fact that it was a "part of a system for enabling the Court to discover the truth". These provisions are meant as much to safeguard the interest of the accused as to enable the Court to come to a right conclusion as to the truth of the charge against the accused. This was also the view in AIR 1934 Allahabad 693 (2). If any contrary opinion was sought to be laid down in AIR 1954 Orissa 65, I would respectfully differ. The contention of Mr. Mukerji learned advocate appearing for the accused-petitioner, that if on account of examination of the pleader and non-examination of the accused himself some incriminating circumstances are left unexplained, the accused would take the risk willingly cannot be sustained.

71. Courts have emphasised the importance of verbal examination of the accused by refusing to treat a written statement of the accused as any substitute for the verbal examination as laid down in Section 342. Section 256 (2) of the Code merely states that "if the accused puts in any written statement, the Magistrate shall file it with the record." It is just a question of not throwing out such a statement but filing it with the record. As was pointed out in Promotha Nath Mukherjee's case, 27 Cal WN 389 : (AIR 1923 Calcutta 470), referred to above,

"a promise to file written statements made at the, time of the plea, in no way exonerates or exempts the Court from examining the accused at a later stage as required by Section 342
* * * There is all the difference in the world between a written statement, presumably prepared, almost certainly revised, by the lawyers appearing for the defense and a

statement made by the accused himself so that the Magistrate can observe his demeanour and his manner while he makes it and come to his conclusions as to the value of his evidence".

A written statement drafted by accused's legal adviser can never have the same value as answers coming directly from accused's mouth and it cannot anticipate the points on which the presiding Officer considers explanations desirable. Such a written statement filed on behalf of an accused person is evolved out of the brain of his legal adviser, helped by friends and relatives and therefore, little or no importance can be attached to such a document. It was clearly pointed out in *Amritalal Hazra v. Emperor*³⁷, that such a written statement would not "take the place of evidence nor of such examination of the accused as is contemplated by the Code". In 1956 SCA 331 : AIR 1956 Supreme Court 238 the Supreme Court deprecated the practice of filing statements while Section 342 contemplates an examination in Court. The same opinion had been expressed in *Raghu Bhumji v. Emperor*³⁸, *Basapa Ningapa v. Emperor*³⁹ If any contrary view was meant to be laid down in *Satyanarayana v. Emperor*⁴⁰, (or in the cases reported in *Mir Tilawan v. Emperor*⁴¹, *Mohiuddin v. Emperor*⁴², or *Budhulal v. Emperor*⁴³), I express my respectful dissent from these. Courts have frowned upon written statements of the accused himself. The statement of one deputizing for the accused in looking after the proceedings of the Court in his absence is definitely on a worse footing.

72. Great emphasis has been placed by the Courts on verbal examination of the accused under Section 342. The importance was stressed by the Privy Council in *Dwarka Nath Varma v. Emperor*⁴⁴. It was pointed out by the Supreme Court in *Tara Singh v. The State*⁴⁵, that the whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. It was laid down:

"It is not a proper compliance to read out a long string of questions and answers made in the Committal Court and ask whether the statement is correct. A question of that kind is misleading..... In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the

³⁷ ILR 42 Cal 957, at p.1027 : (AIR 1916 Cal 188 at pp.213-214

³⁸5 Pat LJ 430 : (AIR 1920 Patna 471)

⁴⁰ AIR 1944 Pat 67

³⁹3917 Bom LR 892 : (AIR 3915 Bom 221), AIR 1921 Mad 679 and AIR 1953 All 781

⁴¹ AIR 1922 Pat 388

⁴³ AIR 1937 Nag 67

⁴⁵1951 SCR 729 : AIR 1951 sc 441

⁴² AIR 1925 Pat 414

⁴⁴ AIR 1933 PC 124 : 37 Cal WN 514.

accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. He is, therefore, in no fit position to understand the significance of a complex

question. Fairness, therefore, requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand."

In 1953 SCA 329 : AIR 1953 Supreme Court 76 Mahajan J. has laid down that the accused must be questioned separately about each material circumstance which is intended to be used against him and that the whole object of Section 342 is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Bose J. observed in *Machander v. State of Hyderabad*⁴⁶, that Section 342 casts upon Magistrates and Judges the duty of questioning the accused properly and fairly, bringing home, to his mind in clear and simple language the exact case he is to meet and each material point that is sought to be made against him and of affording a chance to explain them if he can and so desires. Jagannadhadas J. deplored, in 1956-19 SCJ 533 : AIR 1956 Supreme Court 536 any departure from strict observance of Section 342. Bose J. in 1956 SCA 175 : AIR 1956 Supreme Court 241 pointed out the solemn and serious duty placed by Section 342 on the Court. At this stage it may be stated that Mr. Mukherjee has sought to find support for his contention in the words "or through the mouth of the counsel", occurring at page 178 (of SCA) : (at p.244 of AIR). But even a cursory reference to the context would make it clear that the Supreme Court was not considering at all the question of examining a "pleader" under Section 342 of the Code. In discussing the question of prejudice only these words were used and the "counsel" referred to therein must be deemed to be the lawyer for the accused.

73. Mr. Goswami has contended that if the intention of the Legislature was that Section 205 and Section 540-A were to govern Section 342 of the Code, it would have expressly provided for this result by including in the latter section some such words as "subject to the provisions of Sections 205 and 540A of the Criminal Procedure Code." To that Mr. Mukherjee's reply is that in the absence of any express provisions in Section 342 that it overrides Sections 205 and 540-A it can be said that the Legislature never intended Section 342 to override Sections 205 and 540A. The fact is that no such words as above, either way have been provided for. Section 342 itself will have to be closely looked into for a decision on the point involved. The words, which in my opinion, are significant inter alia are "without previously warning the accused", "shall" (which indicates the mandatory nature of the examination), "for the purpose aforesaid" (i.e. for the purpose of enabling the accused to explain circumstances appearing in the evidence against him) in Section 342 (1). Some of the relevant facts may lie within the special knowledge of the accused, e.g. provocation, exercise of the right of private defense, etc. Then again it is only the accused who can explain away the presumption under Section 114 (a) of the Indian Evidence Act, e.g. possession of jewels belonging to a murdered man, which is sought to

⁴⁶1956 SCA 12 : AIR 1955 SC 792

be proved against the accused by the prosecution in proof of the allegation that he is the murderer as well as the thief (vide AIR 1921 Madras 679). Take again the case of circumstantial evidence or general allegation of enmity with the complainant or with the prosecution witnesses. If an agent or "a pleader" tried to explain away the circumstances which cannot but be based on the personal knowledge of the accused, it may be argued - and with considerable force - that the statement of the agent was based on hearsay knowledge. The accused may be even away from the country, for example in U.K. and it will be next to impossible on the part of the agent to

contact him and get the necessary information for replying to questions under Section 342. Even if the accused be available in the same city or town, evidence may be closed, say at about noon and the Magistrate may call upon the agent, according to the contention of the accused, to reply to the questions immediately. The agent might have met the accused on the previous day when the entire evidence had not been recorded. Can it be said that the agent could have taken full instructions from the accused in such a case, so as to be able to answer all questions? Generally speaking also, it may not be possible for the agent to get instruction for, or answers to, all possible questions that may be put under section 342. Such anticipation would be an impossibility. Can it be said that in such case the intention of the Legislature was that the agent would simply answer not-guilty to all such questions or refuse to answer such questions as a matter of course? The whole object of the section would stand frustrated. The Magistrate is not bound to wait just to accede to the request of the agent for time to take instruction from the client. The answers would in all likelihood be fabricated if at the close of evidence such questions are not at once put and answered. Section 342 (1) definitely means that the Court will not previously give out the questions to the accused or the agent. Then again where is the privity of contract between the agent and the accused in regard to the answers that may be given? This question was raised in 93 Ind Cas 232 : ILR 50 Bombay 250 : (AIR 1926 Bombay 218). In that case it was observed that there should be clearly on record something to show that he who represented the accused had been duly appointed by him - just as an ordinary pleader had to file a vakalatnama. It was pointed out that where there was no power-of-attorney or letter of authority to show that a person had been appointed by an accused person to appear and plead on behalf of the accused, the Court was not entitled to accept the plea of guilty put forward by such person and to convict the accused upon such plea. This seems to be one of the principal decisions relied on by the accused-petitioner, in the instant case and I shall have occasion to refer to this hereafter. Now, can the accused be prevented later from saying that the pleader had no authority to answer a question in a particular way or to answer it at all or that he had gone against his instruction? In the absence of carefully documented papers, such a plea prima facie cannot be straightway rejected. Subsection (3) of section 342 is to the following effect:-

"The answers given by the accused may be taken into consideration in such enquiry or trial and put in evidence for or against him in any other enquiry into, or trial for, in other offence which such answers may tend to show he has committed."

Can it be argued that a statement of an agent may be put in evidence for or against the accused in any other enquiry or trial as aforesaid? The cardinal principles of criminal trials will be violated prima facie if an agent's answers in these circumstances are allowed to be put in evidence against the accused subsequently. Sub-section (4) of section 342 stands in the way of administration of oath to the accused when he is examined under sub-section (1). This, in my view, is a special privilege of the accused and cannot be extended to any agent or pleader. How unreal moreover it would be if under sub-clause (2) the agent gives false answers to the questions and yet if allowed to enjoy an immunity that truly belongs to the accused. Demeanour may have to be considered by the Court and the Jury (if any), specially in reference to sub-section (2). But when an agent or "pleader" is allowed to be examined, the advantage of noticing the demeanour will be non-existent. An ingredient, howsoever small it might be, would be lacking in that case. It has been urged that under sections 243 and 255 of the Code, read with Sections 205 and 540-A, it is permissible on the part of the agent to plead guilty on behalf of the accused. It will be seen that

the word "may" has been used in section 243; and the corresponding words in section 255 (2) are "may in his discretion convict him thereon". In either case the Magistrate has discretion. Moreover at the stage of section 243 or 255 there is no real contest. Till the stage of section 342 is reached the accused or his "pleader" plays more or less a passive role - a watching role so to speak, unlike the stage of 342 where the accused is expected to take an active role. It will not be a sound argument, therefore, to assert that merely in view of sections 243 and 255 of the Code, the agent or pleader may be allowed to answer questions for the accused. Nor is there any substance in the argument that because the Legislature by enacting sub-clause (2) of section 205, has provided for the attendance of the accused when necessity arises, it must be assumed that the Legislature intended that a "pleader" might officiate in place of the accused even for purposes of section 342 of the Criminal Procedure Code and that Magistrate was not obliged to examine the accused personally. The answer is that various circumstances arise in earlier stages, such as the necessity for identification of the accused in Court when the personal, attendance of the accused might be required by the Magistrate - either under section 205 (2) or under section 540-A (1). The provisions contained in section 205 (2) or 540-A (1) by themselves certainly do not prove that the agent or pleader is competent to answer questions under section 342. What is stressed in, section 205 (2) or 540-A (1) is the procedure by which the accused may be brought up for personal attendance. That way the accused may be brought up compulsorily under Section 342 Criminal Procedure Code also. Section 366 (2) also does not in any way militate against this view.

74. It is realized that the High Courts of India are more or less divided on this point and there are some differing judgments on this point even in this Court. Mr. Mukherjee has placed reliance in support of his contention on the decision in 35 Cr LJ 1035 : (AIR 1934 Bombay 212). In that case, mainly relying on Dorabshah Bomanji's case ILR 50 Bombay 250 : 93 Ind Cas 232 : (AIR 1926 Bombay 218), it was held by Beaumont, J., sitting with another learned Judge that section 342 must be read subject to the provisions of section 205. Unfortunately the terms of section 342 were not examined at all. Beaumont, J., however, as the judgment shows, had his doubts on certain points but found himself bound by the previous decisions. But neither Dorabshah's case, AIR 1926 Bombay 218 nor that of Maung Po Nyein AIR 1927 Rangoon 73 had discussed the wordings of section 342 or their import or implications. It has been pointed out above by me that reading sections 205, 540-A and 342 together it does not follow at all that the former sections govern the last mentioned section. In Dorabshah's case, AIR 1929 Bombay 218 one of the main questions to be decided was whether there was due authorisation of the agent by the accused and the other important point turned on the question if the Magistrate had acted illegally in convicting the accused on the plea of this Estate Manager. There was just only one fleeting reference to section 342 and in examining the English law on the point the terms of section 342 were not considered at all. In view of what has been stated above by me I would respectfully dissent from the view expressed in these two Bombay decisions. For similar reasons, stated in my judgment above with due respect, I must express my dissent from the views contained in *Rusi Biswal's case* or *re: C.M. Raghavan*⁴⁷, or *Mt. Kanchan Bai v. State*⁴⁸, which did not consider the earlier case of the Allahabad High Court, AIR 1934 Allahabad 693 (2) and which did not make, for general purposes even a passing reference to AIR 1934 Allahabad 389 or AIR 1953 Allahabad 781 or *Mt. Dhanu v. Rex*⁴⁹, Sindh Judicial Commissioner's Court, which had laid emphasis specially on Form I, Schedule V of the Code. Unfortunately the terms of section 342 were not mentioned, far less examined, in any of these judgments, which I am constrained to say with due respect, did not also consider the import or the implications of section 342 of the Criminal

Procedure Code. For similar reasons, in view of what I have stated above in course of this judgment, I have to express my respectful disagreement also with the views expressed in *Begum Eejun v. State*⁵⁰,

75. The cases of this Court may now be referred to. The first case relied on by Mr. Mukherjee is 6 Cal WN (Notes) LIX. That case, however, deals with the question of Magistrate's discretion to dispense with the personal attendance of the accused under Section 205 in view of his illness; and the distance of the place of residence from the place of trial. The order passed by Prinsep and Stephen, JJ., was to the effect that the Magistrate do dispense with the personal attendance of the petitioner and proceed with the trial of the case in such manner as he thought proper. In the next case, 14 Cal WN (Notes) cxxxi the point for decision was whether the Magistrate had jurisdiction to make a second order under section 205 Criminal Procedure Code. It was laid down by Stephen and Carnduff, JJ., that it was open to the Magistrate to make the order under section 205 as often as the accused might require. This case like the previous one, therefore, is not apposite. The decision of Chitty and Richardson, JJ., in 21 Cal WN (Notes) clxviii was in reference to the "plea" of the accused, presumably referring to the stage of section 255 of the Code, The relevant portion reads as follows:-

"The case having arrived at the stage at which the plea of the accused had to be recorded, the learned Chief Presidency Magistrate being of the opinion that it was not open to him to get her plea through her pleader cancelled the order and directed that she should appear in Court and plead to the charge personally." Obviously, this case had nothing to do directly with the question relating to section 342 of the Code. Mr. Mukherjee had stressed the words "personal attendance of the petitioner to be dispensed with until the conclusion of the trial" in the concluding portion of the Notes which is to the following effect:-

"Their Lordships ordered the personal attendance of the petitioner to be dispensed with until the conclusion of the trial and directed that her plea be taken through her pleader and in "Case, she files a written statement the same may be accepted as embodying her plea."

There is no reference whatsoever to the examination of the accused under section 342 of

⁴⁷ AIR 1954 Orissa 65, AIR 1950 Mad 814

⁴⁹ AIR 1950 Ajmer 15 (2) or 14 Cr LJ 272 (Sind)

⁴⁸ AIR 1959 Mad Pra 150 or AIR 1959 All 623

⁵⁰ AIR 1955 Raj 175 and 1960 Cr LJ 1597 : AIR 1960 Ker 383

the Code and, if the Notes have fully recorded the points decided, this case will be no authority for the point in issue. Merely the words "dispensed with until the conclusion of the trial" will not be sufficient to prove that their Lordships were actually deciding the point involved in section 342 as well. In the last mentioned case reference was made to 17 Cal WN 1248. Two questions were involved in that case first, whether the Deputy Magistrate of Nadia had rightly rejected the accused's petition under Section 205 Criminal Procedure Code and secondly, whether the case should be transferred to some other Court. The judgment made no reference to section 342 of the Code. Imam and Chapman, JJ., ordered inter alia.

"We direct that the two petitioners be allowed to appear at the enquiry or trial by their pleader or pleaders, subject to their having to appear before the sentences passed, should the case be proved against them at the trial and in conviction * * * * Clearly, there was no

decision on the question of any exemption under section 342. From the ordering portion alone it cannot be argued that their Lordships decided this aspect of the question as well. This brings us to 49 Cal WN 537 : (AIR 1945 Calcutta 482). It has been clearly laid down in that case by Lodge and A.N. Sen, JJ., that although section 540-A, Criminal Procedure Code, permits a Magistrate in special cases to proceed with a trial in the absence of an accused, it does not permit the Court to dispense with his presence for examination under section 342 or to examine his pleader under that section. It will not be true to say that their Lordships did not give any reasons. Although there was no elaborate discussion, there was clearly a reference to the provisions of section 342 and the examination of the accused in reference to the provisions of that section. In a subsequent case, 54 Cal WN 207 : (AIR 1950 Calcutta 161), Chunder and Guha, JJ., held that the case of Adeluddin, 49 Cal WN 537 : (AIR 1945 Calcutta 482) had not been correctly decided. But the case was not referred to a Full Bench. In a later case, 57 Cal WN 135, Chunder, J., sitting singly, held with reference to the examination of the accused's agent - a muktear in that case - that no one could make an "admission for an accused person in a criminal trial except the accused himself. In Tapan Kumar's case, 57 Cal WN 135, Chunder, J., ordered that the Magistrate should insist on the personal attendance of the accused and examine him under section 342. The cases of Adeluddin, 49 Cal WN 537 : (AIR 1945 Calcutta 482) and Champa Devi, 54 Cal WN 207 : (AIR 1950 Calcutta 161) came to be considered in Criminal Revn. Case No.1287 of 1953 D/d. 22-7-1954 (Cal). Judgment was delivered by Mitter, J. and my learned Brother S.K. Sen, J., concurred. As the case has not been reported yet, some of the observations may be quotes with advantage:

"In our view the provisions of section 342 Criminal Procedure Code are mandatory. We are also of the view that the section provides for the personal examination of the accused and not anyone representing him. This view is supported by the case of 49 Cal WN 537 : (AIR 1945 Calcutta 482), a Bench decision of this Court. This decision was, however, dissented from in a later case 54 Cal WN 207 : (AIR 1950 Calcutta 161), also a Bench decision. In the latter case, Chunder and Guha, JJ., held that the case of 49 Cal WN 537 : (AIR 1945 Calcutta 482) had not been correctly decided. Their Lordships, however, did not think it necessary to refer the point to a Full Bench as the case they were deciding did not involve one of several accused persons being allowed under section 540-A to be represented by a pleader. The case before Chunder and Guha JJ. concerned the exemption of a sole accused from appearing in Court under section 205 Criminal Procedure Code in 49 Cal WN 537 : (AIR 1945 Calcutta 482), Lodge, J., observed:-

There is no provision for examining the pleader of the accused under section 342 in any case. It seems to me that the Magistrate exercised his discretion wrongly in the present case in trying Kamaruddin in his absence."

Sen, J., in the same case observed :

'I also agree with my learned brother that the trial of Kamaruddin has been bad inasmuch as he was not examined in accordance with the provisions of section 342 of the Code of Criminal Procedure. The law, it is true, provides for a trial to proceed in the absence of the accused (vide section 540-A); but the section does not permit the trial to proceed without the presence of the accused at stages where under the law the presence of the accused is imperative. One of these stages is when the accused is required to be examined in accordance with the provisions of section 342 of the Code of Criminal Procedure. In my opinion, the Court cannot dispense with the presence of the accused at this stage.' Speaking with great respect, we do not agree with the observation of Chunder, J., in 54 Cal WN 207 : (AIR 1950 Calcutta 161) that there is nothing in section 342 itself which requires the personal attendance of the accused. Section 342 in terms requires the Court to examine the accused. Chunder, J., again speaking with great respect, misread the observation of Lodge, J., as to the Magistrate having exercised his discretion wrongly in trying the accused in his absence. This observation was not with reference to the failure of the Judge to examine the accused under section 342 but was with reference to the discretion of the Magistrate in trying the accused in his absence. It is interesting to note that in a later case, 57 Cal WN 135, Chunder, J., sitting singly, held with reference to the examination of accused's agent, a Mukhtear in this case, that no one could make an admission on behalf of an accused person in a criminal trial except the accused himself. In this case, Chunder, J., ordered that the Magistrate should insist upon the personal attendance of the accused and examine him under Section 342. In our view, the provisions of the Code which provide for exemption of an accused person during any stage of a trial cannot control Section 342 which requires the personal examination of an accused. The point seems to us to be so obvious that we do not feel called upon to consider any other decision. In our view, the case of 49 Cal WN 537 : (AIR 1945 Calcutta 482) was rightly decided and the case of 54 Cal WN 207 : (AIR 1950 Calcutta 161) was wrongly decided- We would, accordingly, refer this matter to a Full Bench and would for its decision formulate the following questions:

- (1) Has a Court jurisdiction to dispense with the personal examination of an accused under section 342 when the accused has been permitted either under section 205 or under section 540-A of the Code of Criminal Procedure to be represented by a pleader?
- (2) Which of the two cases - 49 Cal WN 537 : (AIR 1945 Calcutta 482) or 54 Cal WN 207 : AIR 1950 Calcutta 161) - was correctly decided?

76. The Full Bench, consisting of the Chief justice and four Judges of this Court, found that the questions referred to the Full Bench did not arise out of the facts and, the case was remitted to the Criminal Revision Bench to be disposed of in accordance with law. J.P. Mitter J. and my Lord S.K. Sen J. decided the case finally on 29.7.55. Their Lordships observed inter alia once more, "* * * In our view Section 342 Criminal Procedure Code requires the personal examination of an accused person and the Court below will be well advised to examine the accused personally under Section 342 Criminal Procedure Code. The last case to be decided on this point, that has been brought to our notice, is that of AIR 1958 Col 431, Mitter, J., in his judgment made the following observations:

"In our view, the provisions of Section 342 of the Code of Criminal Procedure are mandatory. We are also of the view that the section provides for the personal examination of the accused and not any one representing him. This view is supported by the cases of 49 Cal WN 537 : (AIR 1945 Calcutta 482), a Bench decision of this Court, as well as by the unreported case of Cri. Revn. No.1287 of 1953 (Cal) also a Bench decision. In the case of 54 Cal WN 207 : (AIR 1950 Calcutta 161), Chunder and Guha, JJ. took a different view. In Cri. Revn. No.1287 of 1953 (Cal), Land Sen, J., took the view that the case of 49 Cal WN 537 : (AIR 1945 Calcutta 482) had been rightly decided and the case of 54 Cal WN 207 : (AIR 1950 Calcutta 161), had been wrongly decided and referred the point involved to a Full Bench for decision. The Full Bench constituted for the purpose took the view that the question did not strictly arise out of the facts as then ascertained and remitted the case' to the Criminal Division Bench. Through deprived of the Benefit of a Full Bench decision on the point, it is also the view of this Bench that the language of Section 342 of the Code of Criminal Procedure clearly provides for the personal examination of an accused."

Delivering a separate but concurring judgment, Debabrata Mookerjee, J., stressed the provisions of section 342. It may, therefore, be taken that the preponderance of view of this Court as definitely in favor of the proposition that Sec, 342 is not controlled by section 205 or 540-A of the Code. In AIR 1934 Allahabad 693 (2), Bennet, J., came to the same conclusion, namely, that the statement under section 342 should be the personal statement made by the accused and not a statement made on his behalf by an advocate. It is refreshing to find that the provisions of section 342 were examined in reference to this question. I am to express my respectful agreement with the views expressed in this case as well as in AIR 1959 Punjab 228. A passing reference may be made to the case of 1953 Cri LJ 253 : AIR 1953 Madhya Bharat 26, wherein the Madhya Bharat High Court (Indore Bench) entirely disapproved of the procedure adopted by the Magistrate in recording the statement of the counsel for the respondent instead of examining him under section 342.

77. Most of the judgments referred to above expressing a contrary view, laid stress on the terms of Section 205 Criminal Procedure Code. I have already indicated that section 205 refers to an earlier and more or less non-contentious, stage of the trial and. as was indicated in *Harinarayan Chandra v. Emperor*⁵¹, A section 205 is concerned with the engagement of a pleader to attend and see that the proceedings are properly and legally

⁵¹ IR 1928 Cal27

conducted during the absence of the accused. The other consideration which seems to have carried weight in those judgments was, as I have discussed earlier, the absence of express words in section 342 to the effect that the personal attendance of an accused was to be invariably compelled even when exemption had been granted under section 205 (1) or 540-A (1) of the Code. But the terms of section 342 are clear enough to refute any such argument.

78. On an anxious consideration of the relevant provisions of law I am of the opinion that it is obligatory on the part of a Magistrate to enforce the personal attendance of the accused even though in earlier stages exemption from attendance had been granted under section 205 (1) or

540-A of the Code., To hold otherwise would be not only doing violence to the language of section 342 and rendering nugatory its salutary provision but also make the examination of the accused and in fact the whole trial most unreal and illusory. It is realized that in certain cases, particularly in regard to pardahnashin ladies some hardship may be caused by insisting on personal attendance, but a Court for that reason cannot put an interpretation on section 342 which cannot but be, to say the least, unfortunate. A purdanashin lady may figure as a complainant in a particular case. Does the law say that she need not examine herself or that no adverse reference is to be drawn from her non-examination? The remedy that suggests itself is recording the statement of an accused, which is usually brief, in camera in an appropriate case.

79. I would accordingly answer the two questions as follows:-

(1) Where a Magistrate has permitted an accused to be presented by a pleader under section 205 (1) or 540-A (1), he is bound to compel the appearance of the accused for examination under section 342 of the Code of Criminal Procedure and he has no discretion in the matter and

(2) the cases of AIR 1958 Calcutta 431 and 49 Cal WN 537 : (AIR 1945 Calcutta 482) were rightly decided.

80. Accordingly, the Rule in the circumstances is to be discharged.

D. N. Das Gupta, J.

81. I agree with my Lord Mr. Justice S.K. Sen in the answers proposed by him.

82. The following questions have been referred to the Full Bench for decision:

(1) Where a Magistrate has permitted an accused to be represented by a pleader under Section 205(1) or 540(1), is he bound to compel the appearance of the accused for examination under Section 342 of the Code of Criminal Procedure, or he may exercise his discretion in the matter and

(2) Were the cases AIR 1958 Calcutta 431 and 49 Cal WN 5S7 : (AIR 1945 Calcutta 482) rightly decided?

83. In the case of AIR 1945 Calcutta 482 which was decided by Lodge and A.N. Sen JJ. on the 10th April, 1945, Lodges J. observed as follows:

"Before we leave the case, I should like to refer to the procedure adopted by the learned Additional Sessions Judge in trying Kamoruddin in his absence. It appears that Kamoruddin was produced at the opening of the case; he was then segregated from the other accused and represented by a pleader throughout and was then ultimately produced again in court only to hear the verdict and receive the sentences. The pleader for Kamoruddin was questioned under Section 342 and his statements were treated by the learned Magistrate as evidence. Section 540A Criminal Procedure Code permits a Magistrate in special cases to proceed with a trial in the absence of the accused. There is

no provision for examining the pleader of the accused under Section 342 in any case....."

A. N. Sen J. observed in that judgment as follows :

"The law, it is true, provides for a trial to proceed in the absence of the accused (vide Section 540A); but the section does not permit the trial to proceed without the presence of the accused at stages where under the law the presence of the accused is imperative. One of those stages is when the accused is required to be examined in accordance with the provisions of S.342 Criminal Procedure Code"

Their Lordships seem to have proceeded on the assumption that the accused was required to be personally examined under Section 342 and they did not consider whether the word 'accused' in Section 342 included his pleader or not. Their Lordships have not given any reasons why the word 'accused' in Section 342 does not include his pleader, when the accused is represented by a pleader.

84. In the case of 54 Cal WN 207 : (AIR 1950 Calcutta 161), which was decided by Chunder and Guha, JJ. on the 9th December, 1949, their Lordships observed as follows :

"We, therefore, hold that Section 342 does not govern Section 205 of the Code of Criminal Procedure as it also does not govern Section 540A and in a case in which the accused is represented by a pleader in accordance with the permission granted by the Court, it is not necessary to call upon the accused to be personally present to be examined under Section 342 of the Code of Criminal Procedure. "

Referring to the case of 49 Cal WN 537 : (AIR 1945 Calcutta 482), their Lordships observed, "no reason was unfortunately given and the other provisions of the Code were not examined". But the force of the decision in the case of 54 Cal WN 207: (AIR 1950 Calcutta 161) seems to have been weakened by the observations of Chunder, J. in the case of 57 Cal WN 135 decided on 16-7-52. In that case Chunder, J. observed:

"No one can make an admission on behalf of an accused person in a criminal case except the accused himself. Therefore, the learned Magistrate acted very wrongly in accepting this admission and in not going into the evidence of the defense witnesses who were produced to substantiate that the age of the accused was not yet 12. It is for this reason that the convictions and sentences of the accused persons are set aside and the case is remanded to the learned Magistrate. He will proceed to the personal examination of the accused Tapan.....and insist upon the personal attendance of Tapan Roy".

85. In the case of Cr. Revn. No.1287 of 1953 (Cal) J.P. Mitter and S.K. Sen, JJ. made a reference to a Full Bench on the 22nd July, 1954 with the following observations:

"In our view the provisions of S.342 Criminal Procedure Code are mandatory. We are also

of the view that the section provides for the personal examination of the accused and not anyone representing him. This view is supported by the case of 49 Cal WN 537 : (AIR 1945 Calcutta 482) a Bench decision of this Court. This decision was, however dissented from in a later case 54 Cal WN 207 : (AIR 1950 Calcutta 161) also a Bench decision.....In our view the case of 49 Cal WN 537 : (AIR 1945 Calcutta 482) was rightly decided and the case of *Champa Devi v. Babulal* was wrongly decided. We would accordingly refer this matter to a Full Bench. ..."

86. The point was not decided by the Full Bench as the question referred to in the case did not arise out of the facts of that case. It was ordered by the Full Bench that the case was to be disposed of by the Criminal Division Bench in accordance with law. Thereafter P. Mitter and S.K. Sen, JJ. decided on the 29th July, 1955, the case following the decision in 49 Cal WN 537 : (AIR 1945 Calcutta 482), J.P. Mitter, J. observed:

"In our view S.342 Criminal Procedure Code requires the personal examination of an accused person and the court below will be well advised to examine the accused personally under Section 342 Criminal Procedure Code"

87. In the case of AIR 1958 Calcutta 431 the point involved was whether the Court had jurisdiction to dispense with the personal examination of an accused under Section 342 of the Code of Criminal Procedure when he had been permitted under 540A of the Code to be represented by a pleader. It was decided on the 11th February, 1958, by J.P. Mitter and Debabrata Mookerjee, of that the language of Section 342 of the Code clearly provided for the personal examination of an accused.

88. Section 540A (1) of the Code of Criminal procedure as it stood before its amendment by the code of Criminal Procedure (Amendment) Act, 1955, (26 of 1955) is quoted below.

"At any stage of an enquiry or trial under this Code, where two or more accused are before the Court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that anyone or more of such accused is or are incapable of remaining before the Court, he may, if such accused is represented by a pleader, dispense with his attendance and proceed with such enquiry or trial in his absence and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused".

89. The scope of the above sub-section of 540A was found to be too narrow and enlargement of the powers of the Court in the matter of dispensing with the personal attendance of an accused was considered necessary. The sub-section as it stood after the amendment by Act 26 of 1955 quoted below:

"At any stage of an enquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interest of justice, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such enquiry or

trial in his absence and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused". After the amendment the Court has been given a very wide discretion and it has been made clear that it may dispense with the personal attendance of the accused at any stage if the accused is represented by a pleader and if his presence is not necessary in the interests of justice. It is also clear that the Court may at any subsequent stage of the proceedings direct the personal attendance of such accused.

90. Section 342 of the Code of Criminal Procedure provides that the Court may at any stage of any enquiry or trial without previously warning the accused put such questions to him as the Court considers necessary and shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defense. The section does not lay down that the accused has got to be examined personally nor is there anything in the section to indicate that at the stage of Section 342 the provisions of Section 540A will not apply. There is nothing in Section 540A to indicate that this section will not apply at the stage of S.342. Section 540 A (1) is to be read only subject to the provisions of Section 366 (2). If in any case the accused has been granted an exemption by the Magistrate under Section 540A (1), the pleader representing him may be examined in his place. But it is always open to the Magistrate to compel the attendance of the accused for examination under Section 342 if the Magistrate considers that necessary for the purpose mentioned in S.342. After the witnesses for the prosecution have been examined in a case it is entirely a matter of discretion for the Magistrate to decide whether the accused himself or his pleader should be examined. It is for the Magistrate to consider whether the circumstances appearing in the evidence against the accused in a case are of such a nature as can be suitably and adequately answered only by the accused himself. It is not possible to prescribe any formula for the purpose. The Magistrate has been given a wide discretion in the matter, but the discretion is not wholly unfettered and it must be exercised judicially and in the interests of justice. In so laying down the law I am not unmindful of the following weighty observations of Rankin, J. in the case of ILR 50 Calcutta 518 : (AIR 1923 Calcutta 470) which every Magistrate should do well to bear in mind :

"..... The intention of the statute is that at a certain stage in the case the Court itself shall put aside all counsel, all pleaders, all witnesses. all representatives and shall call upon each individual accused with the authority of the Court's own voice to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating....."

91. whether an accused who has been granted exemption under Section 205 (1) of the Code of Criminal Procedure can be represented by his pleader at the time of examination under Section 342 is now to be examined. In an old decision of this Court 14 Cal WN (Notes) 131. Stephen and Carnduff, JJ. Observed.

".....It was apparently the view of the Magistrate that he could only make an order under Section 205 Criminal Procedure Code, once and that the effect of that order having come to an end he could not make the order again. In our opinion he was wrong in this and it was open to him to make the order under Section 205 as often as the accused might

require....."

But in the case of *Kalidas Banerjee v. The State*, which was decided by J.P. Mitter and S.K. Sen, JJ, on 23-6-1954 AIR 1954 Calcutta 576 J.P. Mitter, J. observed as follows :

"Section 205 Criminal Procedure Code in terms refers to the powers 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 inquiring into or trying the case to direct the personal attendance of an accused has reference to an exemption already granted by the Magistrate issuing summons. Section 205 Criminal Procedure Code does not in our view confer upon a trial court the power to dispense with the personal attendance of an accused during his trial....."

It is not clear whether or not the trying Magistrate in the case was the same Magistrate as had issued the summons. His Lordship proceeded to observe "Section 353 Criminal Procedure Code cannot also be said to confer upon a Magistrate trying a case any power to dispense with the personal attendance of an accused." His Lordship concluded,".....the only section which, in our view, can be invoked for the purpose after a trial has begun is Section 540A Cr, P.C." Personally I am of the view that if an accused has been permitted to be represented by a pleader under Section 205 (1), the pleader may be examined under Section 342. The provisions of Section 342 are no doubt mandatory but that only means that the provisions of Section 342 must be complied with. The accused is to be personally examined if he is not represented by a pleader, but if he is represented by a pleader the pleader may be examined on his behalf unless the Magistrate considers the accused's personal examination necessary. There is nothing in Section 342 or Section 205 to suggest, either expressly or by necessary implication, that the accused's pleader cannot be examined, even though the accused has been permitted to be represented by a pleader under Section 205 (1).

92. I would therefore answer the questions referred to the Full Bench as follows:

- (1) Where a Magistrate has permitted an accused to be represented by a pleader under Section 205 (1) or Section 540A (1) of the Code of Criminal Procedure, he is not bound to compel the appearance of the accused for examination under Section 342 of the Code but he may in his discretion examine the pleader for the accused on the accused's behalf;
- (2) In the above view, the case of AIR 1958 Calcutta 431 and the case of 49 Cal WN 537: (AIR 1945 Calcutta 482) were not correctly decided.

Amaresh Roy, J.

93. I find myself unable to agree with views expressed by My Lords S.K. Sen, J, and N.K. Sen, J. and D.N. Das Gupta, J. and that for the reasons that I shall presently state. I am generally in agreement with the views and conclusions of my learned brother B.K. Bhattacharya, J., on the question before us, but not exactly on same reasons. I therefore proceed to give my opinion and

reasons for the same.

94. This Reference raises a point of fundamental character concerning criminal trials on which there has been pronounced divergence of opinion not only in this Court but also in other High Courts in India in recent years. The question involved has been stated in the present reference made by a Division Bench composed of our learned brothers S.K. Sen and K.C. Sen JJ. as

"Where a Magistrate has permitted an accused to be represented by a pleader under Section 205 (1) or 540A, is he bound to compel the appearance of the accused for examination under Section 342 Criminal Procedure Code or he may exercise his discretion in the matter".

95. This question has been hanging fire for some time in this Court. In 1950 a Division Bench (Chunder and Guha, JJ.) in a decision reported in *in the case of Champa Devi v. Babulal*⁵² expressed disagreement with the earlier decision of another Division Bench (Lodge and Sen, JJ. pronounced in 1945 in the case of 49 Cal WN 537: (AIR 1945 Calcutta 482). Upon that disagreement their Lordships Chunder and Guha JJ. felt the necessity of considering whether a reference to Full Bench should be made and they said in the judgment reported in 54 Cal WN 207 : (AIR 1950 Calcutta 161):

"We would have referred this matter to a Full Bench as, in our opinion, the decision in the case of 49 Cal WN 537 : (AIR 1945 Calcutta 482) is not correct, but in the present case it is not necessary to do so because this is not a case in which one out of several accused persons was allowed under Section 540A to be represented by a pleader. In the present case, the permission was granted under Section 205 of the Criminal Procedure Code as we have pointed out and we have pointed out that in the Criminal Procedure Code there are two provisions for ordering subsequent personal attendance of the accused after an order dispensing with such attendance has been passed under Section 205 of the Code. Neither of these two applies in the present case".

96. That is where the controversy rested for about 3 years. In 1953 the same question was in fact referred to Full Bench by my Lords Mitter and Sen, JJ in Criminal Rev. No.1287 of 1953 (Cal) by saying in that order of reference:

"In our view, the provisions of the Code which provide for exemption of an accused person during any stage of a trial cannot control section 342 which requires the personal examination of an, accused. The point seems to us to be so obvious that we do not feel called upon to consider any other decision. In our view, the case of 49 Cal WN 537 : (AIR 1945 Calcutta 482) was rightly decided and the case of 54 Cal WN 207 : (AIR 1950 Calcutta 161) was wrongly decided".

⁵²54 Cal WN 207 : (AIR 1950 Cal 161)

It was Full Bench Reference No.1 of 1954.

97. Unfortunately that reference was abortive as the Full Bench (Chakravarti, C.J. and Das

Gupta, Lahiri, Mitter and Guha, JJ.) pointed out that upon facts disclosed in the records of that case the question did not arise as there was no order in that case dispensing with the personal attendance of the accused for the date on which the pleader representing the accused was examined under Section 342 Criminal Procedure Code.

98. Five years later, in 1958 another Division Bench (Mitter and Debabrata Mukherjee, JJ.) again grappled with the question and noticed the conflicting decisions of several Division Benches including the one in which the abortive reference to Full Bench was made, yet their Lordships did not make a reference to Full Bench but themselves pronounced a judgment taking the same view of law as was taken by Mitter and Sen, JJ. mentioning above, thereby only adding to the number of conflict without resolving the controversy. That case is reported in AIR 1958 Calcutta 431.

99. It has to be noticed that in all the four cases mentioned above as in most of the decisions of other High Courts the question was raised after order of conviction had been made, but in the present case the question has arisen during the trial before it has been concluded.

100. Relevant facts in the present case are that upon a petition of complaint cognizance was taken by the learned Magistrate against three persons including present petitioner Probha Devi. By an order dated the 29th May, 1959 summons was directed to issue against the other two accused persons for alleged offences under Section 447 and S.323 Indian Penal Code and present petitioner was summoned only under Section 323 Indian Penal Code. In the summons that was issued in form No.1 of Schedule V of the Code, the words "or pleader" were scored out. The summons was returned unserved and on 26th June, 1959 warrant with bail of Rs. 200/- each for the arrest of the three accused persons was directed to issue. Before any warrant was in fact issued the other two accused persons appeared before the learned Magistrate on 27th June, 1959 and on the same date a petition was filed on behalf of the present petitioner for permission to allow her to appear by pleader. This prayer was opposed by the complainant but the learned Magistrate who issued the summons made an order on 27th June, 1959 allowing Probha Devi to appear by pleader under Section 205(1) Criminal Procedure Code. On that very day the case was transferred to another Magistrate for trial and the transferee Magistrate on the same day made an order "Accused Probha Devi is allowed to appear by agent on execution of bond of Rs. 500/-." It appears that during trial she appeared through lawyer though the order sheet is not explicit about it on all dates of trial. Prosecution evidence closed on 14th March, 1960 but on that date the learned Magistrate did not proceed to examine any of the accused persons, under Section 342, Cri. P.C. because the present petitioner had not personally appeared and he fixed 26th March, 1960, for that purpose. On 26th March 1960 Probha Devi was absent and a petition with Medical Certificate was filed praying for her examination under Section 342, Cri. P.C. through lawyer and a written statement was sought to be filed. The learned Magistrate passed an order saying:

"The written statement can be submitted only after and as a supplement to her examination under Section 342, Cri. P.C. I am afraid that in view of the Ruling of Hon'ble Calcutta High Court the prayer of accused Probha Devi cannot be allowed and she must have to appear in court to be examined under Section 342, Cri. P.C. even though she was so long allowed to be represented under section 205, Cri. P.C. I am however prepared to examine her under Section 342, Cri. P.C. in camera in court as she is reported to be a

Purdahnashin lady."

He fixed 24th April, 1960, for such examination.

101. Against that order of the learned Magistrate, this Court was moved and a Rule issued on 4th April, 1960 giving rise to Criminal Revision No.525 of 1960 calling upon the District Magistrate Burdwan and also the complainant opposite party "to show cause why the petitioner should not be exempted from personal appearance in Court for answering questions under Section 342, Cri. P.C. or such order made as to this Court may seem fit and proper." When the case was heard before the Division Bench, the State did not appear. The petitioner and complainant were represented by their respective Advocates and Mr. Sudhansu Sekhar Mukherjee was heard Amicus curiae. Before this Full Bench also the State has not appeared and Mr. Mukherjee has appeared for the petitioner while the complainant has appeared by Mr. Nilmoni Goswami.

102. That the question involves a matter of fundamental importance as to the manner of examination of accused under Section 342, Cri. P.C. is writ large in the question itself. Answer to it depends mainly on the interpretation of Section 342 Cri. P.C alone. Neither Section 205 nor Section 540-A contain any express words to admit of the view that those two sections control Section 342 (1), first part in itself is discretionary or the second part which is mandatory. If on interpretation of Section 342, Cri. P.C. it be held that it enjoins personal examination of accused, then despite any order in terms of Section 205 and Section 540-A, Cri. P.C. for complying with mandatory provision in second part of sub-section (1) of Section 342, Cri. P.C. accused will have to be personally examined at that stage by directing the accused to appear in person in court by exercise of powers given by those sections 205 and 540-A, Cri. P.C. It is a question, in my opinion, of giving effect to Section 342, Cri. P.C., not of one section controlling any other.

103. For proper interpretation of Section 342, Cri. P.C. on the language that it now bears it is necessary to keep in forefront the history of that provision in the Code. It is based on the English principle emanating from the dictum of Lord Justice Tindal in the trial of Frost and eleven others in the Monmouth Special Commission, 1839 reported in *R. v. Frost*⁵³, In India the earliest provision in this respect was introduced by Section 202 of Act XXV of 1861 by which it was entirely discretionary and it did not apply to Magisterial trials in summons or warrant cases. It applied only to preliminary enquiry by Magistrates in cases triable by Court of Sessions and by Section 373 of that Act, applied also to trials in Court of Sessions. The discretion thus vested in Courts was often not exercised and this Court issued a general instruction by a letter dated the 28th July, 1884 for examination of accused on points requiring elucidation, the object aimed at being to elicit the truth by enabling the accused to explain matters and also clearing up obscure points by means of such explanation. See 29 Cal WN 231 at p.237 : (AIR 1925 Calcutta 361 at p.364)).

104. Then came Act X of 1872 in which the discretionary nature of examination was
⁵³(1839) 9 C and P 129

retained but field of its application was enlarged to include all enquiries and trials. The language employed in several sections of this Act was held to be dangerously wide and fraught with dangerous consequences. In course of time different High Courts in India laid down a series of rulings in which it was held that the power that law gave should be exercised to ascertain from the accused how he can explain the facts adduced in evidence against him and not to entrap him

into making self-incriminating statements.

105. These series of rulings necessitated the amendment made by Act X of 1882. Section 342 of Act X of 1882 gave the Courts discretion at any stage of the trial or enquiry to question the accused and enjoined that at the close of prosecution evidence they "shall for the purpose aforesaid question him generally." The mandatory provision introduced for the first time in Act X of 1882 retained its shape in Act V of 1898 and has not been affected by amending Acts of 1923 and 1955.

106. This history clearly indicates to my mind that the Indian Legislature up to 1923 was gradually enlarging the field of exercise of power of the Court to question the accused for the purpose of enabling him to explain any circumstance appearing in evidence and at a particular stage during the inquiry or trial, i.e., at the close of prosecution evidence, made it mandatory to exercise that power. This the Court has been enabled to do "without previously warning the accused." Same structure of Section 342 has been retained by Indian Parliament although large amendments in other parts of the Code were carried but by Act 26 of 1955, for the avowed purpose of speeding up trials in inquiries and for that purpose Section 540A was amended also. But Section 342, Cri. P.C. has not been amended by Act 26 of 1955. The legislative intendment inherent in that history of the section is that in so far as at other stages of enquiry or trial exercise of the power to question the accused has been left to the discretion of the Court, at the stage reached after the witnesses for prosecution have been examined and before he is called on for his defense, it is obligatory for the Court to question him generally on the case for the purpose of enabling the accused to explain any circumstance appearing in the evidence against him. Gradual obliteration of discretion is writ large on that history of the Section 342, Cri. P.C, until discretion has been retained only in first part and completely obliterated in the second part of the section. The mode of recording the statement has been specifically provided by Section 364, Cri. P.C. that

"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 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 and add to his answers."

107. Reading Section 342, Cri. P.C. as a whole and in conjunction with Section 364. Cri. P.C. there cannot, in my view, be any doubt that the section provides for personal examination of the accused person in court. The two phrases "The Court mayput such question to him as the Court considers necessary" and "shall... ..question him generally on the case" has to be read in the background, of the other phrase also occurring in the same sub-section "without previously warning the accused." When so done it clearly indicates that the Legislature had in mind the personal examination of the accused himself, because the phrase "without previously warning the accused" would be without any significance or meaning of it were not the accused who was being questioned-Moreover, sub-section (2) of Section 342 speaks about inference being drawn from answers given or refusal to answer and sub-section (3) provides that the answers given may be taken into consideration in such enquiry or trial and put in evidence for or against him in any

other enquiry into or trial for any other offence which such answers may tend to show he has committed. This provision in my view would be inept if any person other than accused himself is examined under Section 342 and that other person provides answers or refuses to answer. This in my view is reason enough for holding that Section 342 contemplates personal examination of the accused. Moreover this view is very much strengthened by the provisions in section 364, Cri. P.C. particularly where that section provides that the statement "shall be recorded in full in the language in which he has examined and the provision regarding signature of the accused and the certificate of the Magistrate or Judge provided for by sub-section (2) of Section 364. They do not just fit in with any person other than accused himself being examined under Section 342, Cri. P.C."

108. Mr. S.S. Mukherjee has argued by reference to Section 353 and Section 366 (2), Cri. P.C. that in those two sections it has been expressly provided for the contingency when the personal attendance of the accused has been dispensed with. Section 353 provides for taking evidence in the presence of his pleader when his personal attendance has been dispensed with. Section 366 (2) provides that when delivering judgment the accused whose presence has been dispensed with need not be brought up or required to attend when the sentence is one of fine only or he is acquitted in either of which cases it may be delivered in the presence of his pleader. Effect certainly is that when the judgment is one of conviction and the sentence is one of imprisonment then only the accused person whose personal attendance during the trial has been dispensed with need be brought up or required to attend to hear the judgment delivered. Mr. Mukherjee's argument is that if the Legislature intended that for examination under section 342 personal attendance of the accused would be necessary, even when his personal attendance during the trial has been dispensed with, then the Legislature would have made such provision in Section 342, Cri. P.C. and absence of any such provision in that section, according to Mr. Mukherjee, shows the contrary intention of the Legislature. This argument leaves out of consideration the loud feature that both Sections 353 and 366 (2), Cri. P.C. occur outside the Chapter XXIV which deals with "General Provisions as to Enquiries and Trials." The provisions in those two sections relied on by Mr. Mukherjee are express exceptions to the requirement of personal attendance of the accused. That shows clearly that where Legislature was intending personal attendance to be unnecessary it was making clear provision by express words. Absence of any such provision in Section 342, Cri. P.C. clearly indicates just the reverse of what Mr. Mukherjee has contended for, that is, where the Legislature has made mandatory provision in the second part of subsection (1) of Section 342 for examination of the accused it has clearly intended personal examination of the accused and not of pleader. The legal maxim "expressio unius, exclusio alterius" has in my view full application in this aspect.

109. The word "pleader" has been defined in Section 4 (l) (r) of the Code and it means a pleader or Muktear and includes not only an Advocate, a Vakil and an Attorney of a High Court but also "any other person appointed with permission of the Court to act in such proceeding." Therefore representation of the accused by dint of an order made under Sections 205 or 540-A, Cri. P.C. may be by such other person'. When that is so and in addition the accused is defended by a pleader, which he may as of right under Section 340, Cri. P.C. then for the purposes of Sections 353 and 366 (2), Cri. P.C. it may be enough for such defending pleader to be present and not even the presence of the person representing under Section 205 or 540-A will be necessary within the sphere of the exception made in Sections 353 and 366 (2), Cri. P.C.

110. It has next been argued by Mr. Mukherjee that throughout the Code beginning from Section 205 and ending with Section 366 when the trial ends by pronouncement of judgment, in various sections the Code has used the word "accused" when for those purposes a pleader defending the accused under the authority of Section 340, Cri. P.C. would be and has been held to be competent to represent the accused. He points out that Section 342 is a section within those limits beginning from 205 and ending with section 366, Cri. P.C. Therefore, according to Mr. Mukherjee's argument, in section 342 also where the word "accused" has been used it should be held that a pleader representing the accused when his personal attendance has been dispensed with should be enough. This part of Mr. Mukherjee's argument neglects the distinction between a pleader by whom the accused may be represented under Sections 205 and 540-A on one hand and a pleader who is defending the accused under the authority of Section 340, Cri. P.C. would be and has been held to be competent to represent the accused. He points out that Section 342 is a section within those limits beginning from Section 205 and ending with Section 366, Cri. P.C. Therefore, according to Mr. Mukherjee's argument, in Section 342 also where the word "accused" has been used it should be held that a pleader representing the accused when his personal attendance has been dispensed with, should be enough. This part of Mr. Mukherjee's argument neglects the distinction between a pleader by whom the accused may be represented under Sections 205 and 540-A on one hand and a pleader who is defending the accused under the authority of Section 340, Cri. P.C. They need not be and often are not, same person. If Mr. Mukherjee's argument would hold, then for the purposes of Section 342, Cri. P.C. it would be not only enough compliance to question a pleader who is representing the accused under Section 205 or 540-A. Cri. P.C. but it would also be enough compliance to question a pleader who is defending the accused by the authority of Section 340, Cri. P.C. No decision of any High Court in India, far less in this High Court, has gone to that length and not even Mr. Mukherjee could contend for that result Therefore the inference that Mr. Mukherjee asks us to draw from the language employed in Sections 353 and 366 (2), Cri. P.C is not warranted by those provisions of the Code. To accept Mr. Mukherjee's contention it would be necessary to read some words in Section 342 which are not there. That would be dangerously near legislating and not interpreting the section as it is.

111. Here I may mention that Section 540-A before amendment by Act 26 of 1955, was not and even after amendment of 1955, is not, coextensive with Section 205, Cri. P.C. in its operation and application. The changes brought about in Section 540-A may be noticed. The limited scope of applicability of Section 540-A before amendment to cases in which there were two or more accused persons have been enlarged by omitting those words' and making it to apply to any inquiry or trial. The prerequisite of incapability of remaining before the Court that availed before amendment of 1955 has now been enlarged to necessity for ends of justice; yet the prerequisite that the accused is represented by a pleader has been retained. In Section 205 these are not necessary, though, that section may be brought into use if the Magistrate "sees reason so to do" and applies to any inquiry and trial. Sub-section (2) of Section 205 envisages its applicability to "any stage of the proceedings." The words in that section "whenever a Magistrate issues a summons" therefore does not limit its use to the point of time when summons is issued and only refers to the incident of issue of summons as distinct from issue of warrant of arrest. If there is already an order under section 205(1) Cri. P.C. then an order under Section 540-A is wholly unnecessary. Therefore representation seems to mean in Section 540-A that the accused is defended by a pleader under Section 540, Cri. P.C. If we remember that Section 205 is invoked by an accused as a privilege and that Section 540-A may be inflicted by the Magistrate without accused's consent and against his wishes, then the result obtained if Mr. Mukherjee's argument is

accepted, is that a defending pleader who has not been authorized by accused to represent him under Section 205, Cri. P.C. may be got hold of by the Magistrate or Judge to do the job of answering questions under Section 342, Cri. P.C. even at the stage when it is mandatory to question the accused under that section, against the wishes of the accused, only if the Magistrate or the Judge thinks that it is necessary for ends of justice. To my mind it is so patently unacceptable that an interpretation of section 342, Cri. P.C. which leads to such result cannot even be countenanced, far less, accepted as good law. Mr. Mukherjee in course of his argument to support the view of law taken in the Division Bench of this Court reported in 54 Cal WN 207 : (AIR 1950 Calcutta 161) has not only drawn support from decisions of other High Courts, namely, AIR 1934 Bombay 212 AIR 1926 Bombay 218, AIR 1927 Rangoon 73, AIR 1957 Madhya Pradesh 219; AIR 1959 Madhya Pradesh 150, AIR 1950 Madras 814, AIR 1954 Orissa 65, but also referred to several earlier decisions of this Court, namely 21 Cal WN (Notes) 168, 6 Cal WN (Notes) 59, 14 Cal WN (Notes) 131 and 17 Cal WN 1248. On closer examination of those earlier decision of this High Court however Mr. Mukherjee himself conceded that they have no direct bearing on the question before us. Of those only two decisions need examination. The case reported in 17 Cal WN 1248 is a case that has been relied on by Chunder and Guha, JJ. in the decision reported in 54 Cal WN 207 : (AIR 1950 Calcutta 161). In that case (17 Cal WN 1248) the offences alleged were offences under Sections 307, 308, 325, 326 etc. of the Indian Penal Code and it does neither appear nor seem likely that summons were issued so as to attract Section 205 Cri. P.C. Several females of respectable family who were some of the accused in that case made an application before the Magistrate before whom the committing proceeding was pending to be exempted from personal appearance in court under Section 205, Cri. P.C. The Magistrate refused that prayer. Against that order the High Court was moved and the High Court made an order that those female accused persons shall be exempted from appearance in court not only during the committing proceedings but also during the Sessions trial in the event of a commitment till the end of the trial; if only the trial ended in conviction they will be brought up before the Court at the time of the pronouncement of the judgment, This order of the High Court made in the case reported in 17 Cal WN 1248 is neither an order under Section 205, Criminal Procedure Code nor an order under Section 540A, Criminal Procedure Code as it was at the date of that decision and it could have been passed only in exercise of the inherent jurisdiction of this Court that is saved by Section 561A, Criminal Procedure Code. In that view of the matter that case has no bearing on the question referred to this Full Bench and Mr. Mukherjee in his usual fairness has himself conceded that.

112. Similarly In a case, a cryptic report of which can be found in 21 Cal WN (Notes) 168 it appears that Chitty and Richardson, JJ. in this High Court ordered the personal attendance of the petitioner to be dispensed with until the conclusion of the trial and directed that her plea be taken through her pleader. The judgment in extenso has not been published and from the reports it only appears that the learned Advocate in support of the petitioner in that case relied on the case in 17 Cal WN 1248 and also referred to Section 366 (2), Criminal Procedure Code as support to the proposition that "there is no law which makes it imperative for the petitioner to personally appear and plead." In the absence of any reason appearing in the report, it is not possible to deduce any view of law and this decision also does not help in deciding the question we have before us.

113. In the case reported in 27 Cal WN 389 : (AIR 1923 Calcutta 470), upon a difference of opinion between two Judges of a Division Bench the case was heard and decided by Rankin, J. (as his Lordship then was) obviously under Section 429, j Criminal Procedure Code. In that case

according to the order-sheet the accused were properly called upon to plead and at that time they stated that they pleaded not guilty and also that they would both file written statements. The stage of S.342, Criminal Procedure Code had not arrived then. The examination and cross-examination of the witnesses for prosecution was completed at a latter date and then a date was fixed for the purpose of accused entering on their defense. There was nothing in the order-sheet purporting to be an examination of the accused under Section 342 nor was there any indication of the questions put and the answers obtained upon such examination. It appeared from the report made by the Magistrate in answer to the Rule that at the close of the prosecution case he had discussion with the learned counsel for the defense as to the number and nature of the witnesses the accused were going to call. It also appeared from the Magistrate's report that he did examine the accused and gave them the fullest opportunity to make their statements. Their written statement was filed when not only had the prosecution witnesses upon cross-examination and re-examination but also their own defense been finished. In that state of the record, before Rankin, J. a point was taken that there has not been a compliance by the Magistrate with the provisions of Section 342, Criminal Procedure Code and his Lordship held at page 408 of the report (CWN) : (at p.481 of AIR):

"In his country it often happens that a prisoner is tried in a language which for one reason or another he understands but indifferently well and for that reason as well as for other equally grave reason, the intention of the statute is that at a certain stage in the case, the court itself shall put aside all counsel, all pleaders, all witnesses, all representatives and shall call upon an individual accused with the authority of the Court's own voice to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating. In the case of an accused who is in no difficulty in understanding proceedings a question addressed to his Counsel in his hearing and answered by his counsel in his hearing may perhaps be taken in certain circumstances as a compliance with the section. It is not a full compliance with the section, but I say nothing whatever to create any more trouble than is absolutely necessary in any case of that character. What is necessary is that the accused shall be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defense if he is willing to make one with his own lips....."

"There is all the difference in the world Between a written statement presumably prepared, almost certainly revised by the lawyers appearing for the defense and a statement made by the accused himself, so that the Magistrate can observe his demeanour and his manner while he makes it and come to his conclusions as to the value of his evidence."

114. Weighty words are these and they were pronounced not as an expression of any sentiment but on careful and judicial consideration of the provisions in the particular S.342, Criminal Procedure Code in the language of which the learned Judge read the intention of the statute. That judgment was pronounced in 1923 and from what I have quoted it is patent that the learned Judge was fully alive to the fact of the accused being defended by lawyer in the trial Court and the functions discharged by such lawyers. In that respect there is little or no difference between 1923

and present time. I do not see any reason for the assumption that in all trials any statement the accused makes is generally what he has been advised by his lawyer to make. Section 342, Criminal Procedure Code does not envisage a prepared statement or an instructed speech, but it envisages 'question by the court' generally on the case "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.....without previously warning the accused". It is true that the function of a lawyer is in large part anticipation, but it can never be true that any lawyer can anticipate all the questions that a Magistrate or Judge may properly ask under Section 342, Cr; P.C so as to prepare a statement and/or coach his client, the accused, to give answers covering all points that the Magistrate may raise in his questions. Therefore the pronouncement of Rankin, J. in the case reported in 27 Cal WN 389 at p.406 : (AIR 1923 Calcutta 470 at p.481), is a judicial pronouncement on the interpretation of S.342, which is entitled to greatest respect even today. Mr. Mukherjee has referred to that part of the learned Judge's judgment where he has said that in the case of an accused who is no difficulty in understanding the proceeding a question addressed to his counsel in his hearing 'may perhaps be taken in certain oircumstances as a compliance with the section' and also where the learned Judge observed that 'in this country an accused is not allowed to give evidence on his own behalf. As regards Mr. Mukherjee's contention regarding the first of these observations, it is enough to point out that the sentence immediately following the portion quoted by Mr. Mukherjee is "It is not a full compliance with the section." In answering the question before us the only sort of compliance we are concerned with is a full compliance with Section 342, Cri. P.C. as a matter of law in all circumstances and not some compliance depending on certain hypothetical contingency of fact and in certain circumstances. About the second of the observations Mr. Mukherjee relied on the fact that by amendment of 1955, Section 342A has been introduced under which the accused has been enabled to give evidence on his own behalf. Rankin, J. was not basing his decision on the inability of the accused to give evidence on his own behalf but mentioned that fact only as an additional reason for holding that Section 342 is of cardinal importance. Even today when by Section 342A accused has been enabled to give evidence on his own behalf, that importance of S.342, Criminal Procedure Code has not dwindled in the least. Under Section 342 the accused can only be questioned generally by the Magistrate or Judge and cannot be cross-examined and by refusing to answer such questions the accused shall not render himself liable to punishment, though an inference can be drawn from his refusal to answer any question. That feature makes a world of difference between the statement of the accused under Section 342 and his right to give evidence in the witness-box under Section 342A, when-he is subjected to cross-examination.

115. That supervening importance of examination of the accused under Section 342 emphasised by Rankin J. in the case reported in 27 Cal WN 389 : (AIR 1923 Calcutta 470), has been again emphasised by a Division Bench of this Court- in the case of 29 Cal WN 231: (AIR 1925 Calcutta 361) has been quoted with approval. The leading judgment in 29 Cal WN 231 : (AIR 1925 Calcutta 361) was delivered by Manmotha Nath Mukerji, J. and his Lordship after carefully recounting the history of this provision of law, held that the accused's attention should be drawn to salient points appearing against him so that an opportunity is really afforded to him to explain him if he can do so. It is true that in that case the question that arose after conviction of the accused person was whether there was a prejudice caused to the accused by the manner of examination made in that case and his Lordship held:

"A refusal to give the accused an opportunity to make a statement at a stage when the

mandatory part of S.342, Criminal Procedure Code is operative vitiates the trial, but an insufficient examination at that stage does not necessarily invalidate."

Newbould, J. in a separate judgment agreed that the trial had not been vitiated by any failure to comply with the mandatory provisions of the section but disagreed on the facts of that case that the examination of the accused person at that trial was not adequate.

116. This importance of examination of the accused under Section 342 has also been recognised by the Supreme Court of India although their Lordships have also held that defective examination or total omission of examination under Section 342 would not by itself vitiate the trial unless there has been prejudice caused to the accused. In the case of AIR 1951 SC. 441, Vivian Bose, J. said :

"It is true the accused can cross-examine as to comity but he is not confined to that. It may be that in a given case cross-examination would be futile, for it would only elicit a denial, whereas a statement made by the accused which the Court directs should be used as evidence, for or against him, might be of great value. In any event the Code directs that the accused shall be afforded these opportunities and an omission to do so vitiates the trial if prejudice occurs or is likely to occur."

"I cannot stress too strongly the importance of observing faithfully and fairly the provision of Section 342 Criminal Procedure Code"

"In my opinion, the disregard of provisions of Section 342 Criminal Procedure Code is so gross in this case that I feel there is grave likelihood of prejudice."

117. In the case of 1956 SCA 331 : AIR 1956 Supreme Court 238 it, has been held-

"It is no doubt true that Section 342 contemplates an examination in court and the practice of filing statements is to be deprecated but that is not a ground for interference unless prejudice is established."

On the authority of the Supreme Court therefore there cannot be any doubt at all that examination of the accused person which the Code enjoins in the mandatory part of Section 342 is not merely a formality but an insistent requirement of law, that requires [href="file:///C:/Documents%20and%20Settings/Administrator/Desktop/SubContractor/POP/Desktop/to.beto](file:///C:/Documents%20and%20Settings/Administrator/Desktop/SubContractor/POP/Desktop/to.beto) to be observed 'faithfully and fairly.'

118. The question is whether that mandatory provision is satisfied by questioning not the accused himself, but by questioning his representative or pleader by whom he is appearing by dint of an order under Section 205 (1) or Section 540A Criminal Procedure Code. I have already observed that there is nothing in those two sections either in express words or even by implication to indicate that examination under Section 342 can be carried out through the pleader. I have also pointed out that in each of Section 353 and Section 866 (2) the Code is making an exception to

the general rule by providing expressly by reference to the order excusing the accused from personal attendance. Yet there is no such exception made in Section 342, Cri. P.C. On the other hand, the contents of Section 342 itself not only in Sub-Section (1) but also in other sub-sections by themselves and taken in conjunction with the provision of Section 364 indicate the legislative intendment of personal examination of the accused was being contemplated. Purpose of that examination no doubt in large part is to afford an opportunity to the accused to explain and/or elucidate points appearing against him in the evidence. But that is not the whole purpose, because refusal to answer or inability to explain may, by dint of the provision in the section itself, result in an inference which would be against him. Can this adverse inference be judicially drawn without giving the accused himself an opportunity to answer the question and to explain if he can? Would it be proper judicial discretion to draw an inference adverse to the accused for omission of the pleader to answer and failure of the pleader to afford the explanation? I am clearly of the view that answer to these two questions must be in emphatic negative.

119. Some of the decisions of this High Court and also other High Courts in India have no doubt said that there is nothing in the Code or in the law providing for the personal appearance of the accused during the trial. With great respect to the learned Judges who delivered those judgments, it appears to me that in their quest for the tree they may have lost sight of the forest. The whole Code of Criminal Procedure in its scheme and structure is based on the direct participation of the accused himself in the trial. No doubt some of the functions can also be performed by a pleader if the accused is being represented by one as provided in Section 340 Criminal Procedure Code. But that is an exception to the general necessity. If the accused could be tried in absentia there would not be any necessity for provisions made in Sections 353 and 366 (2) and perhaps not also of Section 283 and Section 512 Criminal Procedure Code. In some of the decisions again, one of the considerations that prevailed appears to be that in certain circumstances the time that may be spent in bringing the accused before the Court for personal examination under Section 342 may be 'waste of time' and at least in one decision of the Orissa High Court reported in AIR 1954 Orissa 65 Panigrahi C.J. expressly said so, when it was observed :

"This could as well be made through her pleader without prejudicing the case of the complainant and to insist on her personal attendance would involve unnecessary waste of time and harassment to the accused."

His Lordship found in that caste that it would be ridiculous to suggest that personal attendance of the accused should be insisted upon. The reason of that observation of the learned Chief Justice of Orissa High Court is found in the earlier part of his judgment when he expressed his view

"The section is wide in its language and does not limit the power of the Court to examine the accused at any particular stage. The Court can examine him as often as it thinks it necessary to do so, to enable the accused person to explain any circumstances appearing against him in the evidence, the object of the section being to see whether the accused can give an innocent explanation of the facts spoken to against him. There is nothing in the language of the section which would prevent the Court from examining accused even after the defense evidence has been recorded." and

"If the Magistrate is satisfied that the examination of the Muktear on behalf of the accused

is sufficient, the non-examination of the accused personally would not render the trial illegal." and

"I am not, however, prepared to go so far as to lay down that where an accused person is not examined at all under Section 342, Cri P.C. the trial would not be vitiated, but where there has been a substantial compliance with the requirements of that section any technical error or omission to have the signature of the accused appended to the statement is only a curable irregularity and would not vitiate the trial." With great respect to the learned Chief Justice I may invite attention to the observation of the Privy Council in *Nazir Ahmad v. King Emperor*⁵⁴. "Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

120. That observation was made in respect of manner of recording a confession under Section 164 Criminal Procedure Code which record has to be done under Section 364 Criminal Procedure Code. It has direct bearing on the question before us, because that is the section that provides for the manner of recording of the statement of Section 342 Criminal Procedure Code as well.

121. In the same case their Lordships of the Privy council also said:

"On the matter of construction Sections 164 and 364 must be looked at and construed together and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. * * * * Their Lordships are satisfied that the scope and extent of the section is far other than this and that it is a section conferring powers on Magistrates and delimiting them. It is also to be observed that, if the construction contended for by the Crown be correct, all the precautions and safeguards laid down by Sections 164 and 364 would be of such trifling value as to be almost idle."

122. Those observations are equally applicable to the matter of construction of Section 342 in conjunction with Section 364 of the Code and the dictum of the Privy Council apply fully to the question we are considering.

⁵⁴40 Cal WN 1221 at p.1227 : (AIR 1936 PC 253 (2) at p.257)

123. Any attempt therefore to shorten the "minute particularities" in the sections on consideration such as saving time and trouble must be held opposed to the whole process of Law codified by Criminal Procedure Code. The delimiting aspect of those two sections are clear provision against clothing the Magistrates or Judges with discretion contained in Section 205 (2) and Section 540A when compliance with Sections 342 Cri P.C. is concerned. It is, therefore, not at all a relevant consideration that discretion given by Section 205 (2) or 540 will be rendered nugatory if all compliance of the provisions of Sections 342 and 364 is insisted upon.

124. During hearing reference was made to Section 130 of the Motor Vehicles Act and Section 581 of the Calcutta Municipal Act, 1951 as instances where provisions have been made to

determine the case in the absence of the accused person. Section 130 (1) (a) of the Motor Vehicles Act is similar to Section 205 (1), Cri. P.C. The other alternative in Section 130 (1) (b) of that Act applies only when the accused pleads guilty and is therefore similar to Section 243 Criminal Procedure Code when examination under Section 342 Criminal Procedure Code is not necessary. Therefore that provision does not show in any way that the requirement of compliance with Section 342 Criminal Procedure Code could be by examining a pleader when the accused does not plead guilty and is tried on evidence.

125. Section 581 of the Calcutta Municipal Act is a provision where service of the summons has been proved to the satisfaction of the Magistrate and yet the accused does not appear and no sufficient cause is shown for non-appearance of such person. In such circumstances by the procedure laid down in Criminal Procedure Code a warrant of arrest would issue. Instead of inflicting that harsh measure, in view of the particular nature of offences under Calcutta Municipal Act, the Magistrate has been empowered to hear and determine the case in the absence of the accused. If upon evidence the Magistrate is of the view that no offence has been made out he will acquit the accused. That would be an order under Section 245 Criminal Procedure Code and examination under Section 342 Criminal Procedure Code is not a necessity in that situation. If however the Magistrate is of the view that in the prosecution evidence there are points that require explanation or elucidation by the accused or else a conviction should follow, then only necessity of examination under Section 342 Criminal Procedure Code arises. But the trials held for offences under Calcutta Municipal Act are by Magistrates who are Presidency Magistrates by Section 579 (2) of that Act. Section 364 (4) Criminal Procedure Code makes an exception of trials held by Presidency Magistrates. Therefore Section 581 of the Calcutta Municipal Act is outside the ambit of reasons I have mentioned above by the effect of reading Section 342 and Section 364 Criminal Procedure Code together. That section also is therefore not a matter that takes away anything from the reasons that have impelled me to take the view I have mentioned already.

126. Regarding apprehension of unnecessary harassment of innocent accused by compelling personal appearance in court only for the purpose of examination under Section 342 Criminal Procedure Code on which Mr. Mukherjee devoted a large part of his argument, it may also be pointed out that examination under Section 342 Criminal Procedure Code is mandatory only after all witnesses for prosecution have been examined and cross-examined. If at that stage in the view of the Magistrate prosecution evidence is such that he need not ask the accused to explain any point that appears against him and so does not think it necessary to examine the accused under Section 342 Criminal Procedure Code then it is a case for acquittal under Section 245 Criminal Procedure Code in trials under Chapter XX and for discharge under Section 253 in trials under Chapter XXI, Criminal Procedure Code. In that situation no occasion for examination of the accused under Section 342, Criminal Procedure Code need arise. Terms of the Sections 245 and 253 Criminal Procedure Code give ample power to the Magistrates to make proper order of acquittal or discharge without examining the accused under Section 342 Criminal Procedure Code. Examination under that section is necessary only when at the close of the prosecution evidence the Magistrate thinks that there are points against the accused in that evidence that need be explained by him if he can. If that is the nature of prosecution evidence and the view of the Magistrate upon that evidence at that stage, then it is no longer a question of "unnecessary harassment" but it has become a necessity for fair trial that the accused should be questioned for giving him an opportunity to explain and for the Magistrate to draw inference

from those answers or refusal to answer before the Magistrate can convict the accused either in trial Under Chapter XX or Chapter XXI. Similar is the situation in inquiries under Chapter XVIII and Sessions trials also, in one under Section 210 Criminal Procedure Code and in the other by charging the jury at the stage of Section 289 Criminal Procedure Code for an acquittal, as was decided in this Court as early as in 1867 in the case of *Queen v. Greedhary Manjee*⁵⁵, (misprint original edition, pp.57). This effect is directly brought about by the use of the words "if any" in each of these Sections 210, 245, 253 and 289 of the Code in relation to examination of accused under Section 342 Criminal Procedure Code at those respective stages.

127. It is clear therefore that when the Magistrate or Judge acts properly in exercise of the powers given by the Code, there is no scope for "unnecessary harassment" of innocent accused by being compelled to appear personally in court for a mere formality of examination under Sec.342. Such apprehension is unreal and is based on an assumption that the Magistrate or the Judge would not act properly in exercise of the powers that law gives them. In interpreting the law we must proceed on its true meaning and effect and not on imagined omissions or even derelictions by Judges and Magistrates.

128. In the case of 49 Cal WN 537: (AIR 1945 Calcutta 482) both Lodge, J. and Sen J. in their respective judgments mentioned as one reason for the view they expressed the particular language of Section 342, Cri P.C. where no exception, express or implied, has been made. That in itself is a strong reason indeed by attracting the maxim *espressio unius exclusio alterius* as the Code contains express exceptions in Sections 353 and 366(2) or. P.C. as I have discussed above. Yet Chunder J", in delivering the judgment of the Division Bench (Chunder and Guha JJ.) in the case reported in 54 Cal WN 207 : (AIR 1950 Calcutta 161) proceeded On the footing that no reason was mentioned in Adeluddin's case, 49 Cal WN 537 : (AIR 1945 Calcutta 482). In this judgment Chunder J. himself referred to only Sections 205 and 540-A, Cri. P.C. but did not examine other provisions in the Code, not even Sections 353 and 366 (2) Criminal Procedure Code though some earlier decisions were discussed by the learned Judge. He attributed a meaning to the word 'accused' occurring in Section 342 Criminal Procedure Code which cannot be fitted with the language in Section 342 itself and also Section 364 Criminal Procedure Code. No reason beyond an assertion of a view appears in the judgment

⁵⁵⁷ Suth WK (Cr) 39

reported in 54 Cal WN 207: (AIR 1950 Calcutta 161). So it does not carry us any further than an assumption which I have shown above to be untenable. A contrary view appears to have been taken by Chunder J. sitting singly in a later case reported in 57 Cal WN 135 on the complaint of Nanda Rani Dasi.

129. In the Bombay High Court it has been consistently held that Section 342 must be read subject to the provisions of Section 205 Criminal Procedure Code to the case of AIR 1926 Bombay 218 and in the case of AIR 1934 Bombay 212. This later decision of the Bombay High Court is by a Division Bench and the judgment was delivered by Beaumont C.J. But unfortunately no reason at all has been mentioned nor the relevant provisions of the Code have been considered and the judgment has proceeded upon an opinion of his Lordship only by reliance on the earlier Bombay decision and the decision of Rangoon High Court reported in AIR 1927 Rangoon 73.

130. In the Allahabad High Court, a Division Bench held in the case of AIR 1934 Allahabad 389

questioning of the pleader who was representing the accused upon an order under Section 205 Criminal Procedure Code did not satisfy the necessity of examination of accused under Section 342, Cri. P.C. On that ground alone conviction was set aside and the case was sent back to the Magistrate that the trial may be completed according to law. Another decision by a single Judge of that High Court in the case of AIR 1934 Allahabad 693(2) held that the Legislature intends that the statement should be personal statement made by the accused and that statement made by an Advocate is merely hear say. In the case of AIR 1959 Allahabad 623 Desai J. sitting singly however took the opposite view relying on the Bombay and Rangoon decisions above referred to, but without noticing at all either the decision of the Allahabad High Court in AIR 1934 Allahabad 389 which was by a Division Bench or the Single Judge decision in AIR 1934 Allahabad 693 (2). Desai, J. delivering the judgment in AIR 1959 Allahabad 623 mentioned only two reasons: (1) The language of Section 250 sub-sections (1) and (2) and (ii) the Court is not bound by any law to direct the personal attendance of the accused for any purpose. But he also mentioned that (i) there is no specific provision which allows the Court to examine the pleader of the accused whose personal attendance has been exempted under Section 205 and (ii) he doubted if it can be said that the Court is compelled by Section 342 to examine the pleader of the accused whose personal attendance has been exempted under Section 205, as the language of neither Section 342 nor Section 205 lends any support to the idea of any such compulsion. His Lordship however decided that case by upholding the conviction because

"The applicants themselves applied for exemption of their personal attendance and cannot be permitted to take advantage of the fact that their application was granted by pleading that in spite of the exemption they should have been summoned to be examined under Section 342 particularly when it was always open to themselves to appear in Court for that purpose."

131. In the Madras High Court also two opposite views seem to have prevailed. In the cases of *Nainamalai Konam*, AIR 1921 Madras 679 and *Nataraja Mudaliar v. Deva Singamani Mudaliar*⁵⁶ it was held that Section 342 contemplates oral statement of the accused himself and a filing of written statement by the pleader is not tantamount to the

⁵⁶ AIR 1931 Mad 241

examination of accused under Section 342. But in the case of (C.M. Raghavan and anr.) reported in AIR 1950 Madras 814, the question of examination of a pleader representing the accused whose personal attendance was exempt under Section 205 Criminal Procedure Code directly arose but only after the order of conviction and Chandra Reddy, J. sitting singly upheld that omission to examine the accused who has been permitted to appear by counsel under Section 205 and whose counsel filed a statement on his behalf does not vitiate the trial. In that case the decision in AIR 1923 Calcutta 470: 27 Cal WN 389 was referred to but the real point in that Calcutta decision appears to have been misinterpreted by thinking that it is based on a ruling of a Bench of that court in the case of AIR 1923 Calcutta 196 : 27 Cal WN 99. His Lordship disagreed with the view in AIR 1934 Allahabad 693 (2) but agreed with view in AIR 1926 Bombay 218 and AIR 1927 Rangoon 73 and AIR 1934 Bombay 212. In Section 205(2) Criminal Procedure Code his Lordship read an intention of the Legislature to vest the Magistrate with discretion at the stage of examination under Section 342 Criminal Procedure Code as well. With great respect to the learned Judge it has to be noticed that the language of Section 342 itself or Section 364 and other relevant sections were not examined and the importance of direct

examination of accused emphasized by Rankin J. in 27 Cal WN 389 (AIR 1923 Calcutta 470) seem to have been completely overlooked.

132. The Madhya Pradesh High Court has taken the same view as in AIR 1950 Madras 814 but both in the case of AIR 1957 Madhya Pradesh 219 and AIR 1959 Madhya Pradesh 150 the question arose after conviction and therefore in the absence of any prejudice caused to the accused the convictions were upheld.

133. The decision of High Court of Punjab in the case of AIR 1959 Punjab 228 was pronounced by D. Falshaw J. sitting singly. The question arose in that case in exactly the form it is before us and the facts of that case have a remarkable resemblance with those in the present case with slight difference in the juxtaposition of the parties that whereas in the present case the application of the accused to be exempted from appearance even for examination under Section 342 has been disallowed by the Magistrate and the accused is the petitioner in High Court, in that case the application to the Magistrate to compel personal appearance of accused for examination under Section 342 was made by the complainant and that application being dismissed the complainant approached the Sessions Judge who recommended to the High Court that the female accused should be examined in person under Section 342. His Lordship D. Falshaw, J. after discussing the earlier decision of this High Court reported in 54 Cal WN 207 : (AIR 1950 Calcutta 161) (Chunder and Guha JJ.) and the decisions in AIR 1950 Madras 814, 1954 Orissa 65, 1957 Madh Pra 219 observed:

"Regarding these decisions I cannot help feeling that in the earliest ones, which have been followed in the others, the views of the learned Judges are somewhat influenced by the point of view from which they were considering the matter. Where an accused person claims and is granted the privilege of not having to appear at the trial in person and in this manner escapes personal examination under Section 342 the appellate or revisional Court will naturally be very reluctant to allow him to take advantage of this fact for the purpose of setting aside his conviction."

134. The learned Judge then proceeded to consider the decision of this Court reported in AIR 1958 Calcutta 431 (Mitter and Debabrata Mukherjee JJ.) and expressed his agreement with that view of law holding

"The provisions (Section 342) are mandatory and the Court has no jurisdiction to dispense with the personal examination of an accused when he has been permitted under Section 540-A to be represented by a pleader and there is nothing in Section 205 or in 540A of the Code to encourage a contrary view."

135. With this view I respectfully agree and I am also in full agreement with his Lordship's view regarding the argument in support of contrary view based on Section 366(2), Cri. P. C for the reasons I have already mentioned.

136. In none of the decisions of the other High Courts that take the contrary view, any consideration of the other relevant sections of the Code have received attention and those decisions also proceed on the same assumption, as expressly mentioned by Desai, J. in the case

reported in AIR 1959 Allahabad 623 that there is nothing in the law to insist on personal appearance, of the accused during the trial. The Code of Criminal Procedure read as a whole repels that assumption as I have discussed above and that takes away the very basis on which that view is founded. For those reasons I hold that view to be erroneous. In the case reported in AIR 1958 Calcutta 431, Mitter and Debabrata Mukherjee, JJ. in their Judgments have given reasons for the contrary view and with those reasons I fully concur, in addition to the reasons mentioned above. The same view was also expressed by Mitter and Sen, JJ. in the case of Cr. Rev. 1287 of 1953 (Cal) and that view is in agreement with the view in the decision reported in 49 Cal WN 537: (AIR 1945 Calcutta 482). It is also fully supported by provisions of the Code as I have discussed above and force of reasons mentioned by their Lordships is not in any way affected even if the observations were obiter dicta.

137. I would therefore answer the questions referred to this Full Bench as

(1) Where a Magistrate has permitted an accused to be represented by a pleader under Section 205 (1) or 540A Criminal Procedure Code he is bound to compel the appearance of the accused for examination Under Section 342 Criminal Procedure Code and the discretions in Section 205 (2) and Section 540A do not authorize him to examine a pleader Under Section 342 Criminal Procedure Code if examination of accused under Section 342 is necessary in any particular case.

(2) The cases reported in AIR 1958 Calcutta 431 and 49 Cal WN 537 : (AIR 1945 Calcutta 482) were rightly decided and the cases reported in 54 Cal WN 207 : (AIR 1950 Calcutta 161) and 85 Cal LJ 147 : (AIR 1950 Calcutta 350) were erroneously decided.

Answer as per majority.