JAMMU AND KASHMIR HIGH COURT

State

Vs.

Ghani Bandar

Criminal Ref. No. 37 of 1958

(J.N. Wazir, C.J., S.Murtaza. Fazl Ali and K.V. Gopalakrishnan Nair, JJ.)

13.10.1959

JUDGMENT

S. Murtaza Fazl Ali, J.

1. This is a reference by the Additional District Magistrate, Anantnag, recommending that an order passed by the trial Magistrate dated 25-7-1958 acceding to the prayer of the accused for a de novo trial may be set aside.

2. The reference arises in the following circumstances:

3. The non-applicants Ghani Bandar and others were being prosecuted for an offence under Sections 147, 447 R. P. C. before the Munsiff Magistrate, Anantnag who after examining some witnesses was transferred to some other place and was succeeded by the present trial Magistrate. When the case was taken by the succeeding Magistrate the accused prayed that the Magistrate should resummon the witnesses. The Magistrate being under the impression that the accused had a right to claim a de novo trial under the provisions of Section 350, Clause (1), Proviso (a) of the Code of Criminal Procedure acceded to the prayer of the accused, and directed the witnesses to be resummoned. This order of the Magistrate is the subject-matter of the present reference. I might also mention that it is not disputed that the case before the Magistrate was a warrant case and that before the order impugned was passed charge had not been framed under the provisions of Section 254 of the Code of Criminal Procedure.

4. The case was first heard by a Division Bench of this Court but in view of conflicting authorities of the various High Courts in India on the point involved it has been referred to us for an authoritative pronouncement on the question no far as this Court is concerned.

5. The point involved in the present case is as to whether the proceedings in a warrant case before the framing of a charge amount to an "inquiry" only or they amount to a trial as contemplated by Section 350, clause (i), proviso (a), Criminal Procedure Code, so as to enable the accused to exercise his right or claiming a de novo trial. The learned Additional District Magistrate is of the view that the proceedings in the present case have not so far ripened into a trial and hence

proviso (a) of clause (1) of Section 350, Criminal Procedure Code, does not apply and consequently the Magistrate had no jurisdiction to accede to the prayer of the accused for resummoning the witnesses. I must confess at the very outset that the question involved in the present case is not free from difficulty and there is a good deal of divergence of judicial opinions on this question. Before, however, I refer to the various authorities on the question I would like to give my own reasons for taking the view that I wish to take in the present case. The relevant portion of Section 350, Criminal Procedure Code, runs as follows:

> "Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself; or he may resummon the witnesses and recommence the inquiry or trial :
> Provided as follows :
> (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard."

It is manifest from an analysis of this section that where a trying Magistrate is succeeded by another Magistrate, the succeeding Magistrate may in his own discretion resummon the witnesses and recommence the inquiry or trial. Where the Magistrate has to exercise such a discretion it is not limited merely to a trial but it can be exercised even in case of proceedings which amount to an inquiry, but where the discretion is not exercised by the Court itself but the accused wants to re-summon the witnesses he can do so only if the proceedings are a trial and not otherwise. In other words, the section fully consistent with the scheme of the Code of Criminal Procedure draws a clear distinction between an 'inquiry' and a 'trial'. Thus the words "inquiry or a trial" as used in this section have been used not in a general sense but in a technical sense. In order, therefore, to appreciate as to whether proceedings in a warrant case amount to an inquiry or a trial We must go back initially to the question as to how have these terms been defined or indicated in the provisions of the Code of Criminal Procedure. Section 4 clause (k) defines 'inquiry' as follows:

> " 'inquiry' includes every inquiry other than a trial conducted under this Code by a Magistrate or Court."

It is, therefore, clear that an "inquiry" under the Criminal Procedure Code is a proceeding other than a 'trial'. The section clearly excludes a trial from the ambit of an inquiry. In ordinary parlance trial would amount to examination and determination of a cause by a judicial tribunal or, to put more concretely, trial connotes determination of the guilt or innocence of the accused by a Court. Thus a trial must either result in conviction or acquittal. The theory of discharge seems to be in my opinion beyond the scope of a trial and such a proceeding comes into being before the beginning of a trial. Now the serious question tor us to determine is as to when a trial commences according to the provisions of the Code of Criminal Procedure. One view seems to be that trial commences when the accused is called on with the Magistrate on the Bench and the accused in the dock and lawyers for the prosecution and the accused are present in Court for hearing of the

case. This view was expressed by the Calcutta High Court in the decision reported in *Comer Sirdha v. Queen Empress*[1], a decision to which I will have to refer in detail a little later. Another view, however, seems to be that trial will not begin until after the accused is called upon to meet the charge framed against him, that is to say, trial is a proceeding which can end in conviction or acquittal and all proceedings anterior to it must be regarded as inquiry. This view was taken by a Full Bench of the Calcutta High Court in a decision reported in *Hari Dass Sanyai v. Srituila*[2], and was later on followed by another Division Bench of the Patna High Court in a case reported in *Hema Singh v. Emperor*[3], The same view was further taken by a Full Bench of the Rangoon High Court in *Emperor v. Maung Ba Thon*[4], An examination of the previous history of the Code of Criminal Procedure shows that in the Code of 1872 both 'inquiry' and 'trial' were defined and 'trial' was defined as proceedings taken in Court after a charge had been drawn. This definition however, seems to have been dropped in the Code of 1882 as also in the Codo of 1898 which is still continuing after a few subsequent amendments. The mere fact, however, that the definition has been dropped does not conclusively show that the Legislature meant to enlarge the scope of trial. In ILR 15 Cal 608 majority Judges constituting the Full Bench held that an inquiry did not include a trial and, therefore, the Legislature incorporated this decision by amending Section 4(K) and excluding trial from the ambit of inquiry. In this connection I might quote the following observations made by a Division Bench of the Madhya Bharat High Court in case *State v. Ambaram*[5],

> "The Legislature made it clear in the Code of 1898 that the view taken by the Calcutta High Court was correct. As has been seen the Code of 1872 expressly laid down that 'trial' meant only the proceedings taken in court after a charge had been drawn up. The fact that this definition was dropped and not reproduced in the Code of 1882, need not lead to the inference that there was an intention to give the term 'trial' a connotation different from what it bore in the Code of 1872."

It is, therefore, clear that the Legislature has drawn a clear distinction between an inquiry and a trial. These two expressions are mutually exclusive. It is also clear to me that wherever the Legislature has used the expression 'inquiry' the conception of 'trial' has been completely excluded. It is well-settled that where the Legislature uses a particular expression at various places the expression must be understood in the same sense and cannot receive different meaning in absence of a very strong reason to the contrary. In this connection it is pertinent to note that under Section 436. Criminal Procedure Code, the Legislature has invested the District Magistrate or the Sessions Judge with powers to direct further inquiry into the case of a person who has been discharged. The proviso to Section 436, Criminal Procedure Code, runs as follows :

> "Provided that no Court shall make any direction under this section for inquiry

[1] ILR 25 Cal 863 [3] AIR 1939 Pat 644 [5] AIR 1953 Mad Bha 1
[2] ILR 15 Cal 603 [4] AIR 1931 Rang 235

> into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made." it will be seen that in this proviso which is meant to cover a specific case of discharge in a warrant case the word 'inquiry' has been used. If, therefore, the Legislature intended that such a proceeding amounts to a trial then it would really be inconsistent with the intention of the Legislature

to use the word 'inquiry' in the aforesaid proviso. It is well settled that Section 436 refers only to inquiries and not to trials, because in the very definition of 'inquiry' as referred to above 'trial' is clearly excluded. I am fully supported in my view by a Full Bench decision of the Rangoon High Court in the case AIR 1931 Rangoon 225 where their Lordships of the Rangoon High Court observed as follows:

"In construing these sections it must steadily be borne in mind that Section 436 has no application to trials, but relates to proceedings antecedent and preliminary to a trial, the object of which is to ascertain whether or not a trial shall take place." The same line of reasoning was adopted by another Full Bench decision of the Madras High Court in case Narayanaswami Naidu In re, ILR 32 Mad 220 at pages 224 and 234 and their Lordships held that in a warrant case trial only begins after the framing of charge. The same view was taken by another Full Bench decision of the Allahabad High Court in case *Queen Empress v. Chotu*[6], I find myself in complete agreement with this view which seems to be fully consistent with the scheme of the Code of Criminal Procedure in drawing a clear distinction between an 'inquiry' and a 'trial'.

6. Another reason why in my opinion the proceeding upto the framing of charge in a warrant case must be held to be an inquiry is the fact that the Legislature itself makes certain distinctions between the two stages of proceedings in a warrant case namely, one leading up to the framing of the charge and the other which proceeds thereafter. In the first place, before the framing of a charge the Legislature has not given the accused a specific statutory right to cross-examine the witnesses although the accused has a right to cross-examine the witnesses as a matter of prudence and practice and in order to give him an opportunity of showing that no prima facie case has been made out against him. I am fortified in my view by a Division Bench decision of the Patna High Court in case *G. L. Biswas v. The State*[7], where after reviewing a large number of authorities their Lordships of the Patna High Court observed as follows:

"Reading the relevant sections of Chaps. 18 and 21 in junta-position it is clear that Section 252 does not give the accused a statutory right, and the opportunity of cross-examination before charge, which in practice he is given, is given as a matter of interpretation and on the application of the principles that the accused must get every reasonable opportunity of establishing his innocence." The same view was taken in *Lachmi Narain v. Emperor*[8], and *Emperor v. C. A. Mathews*[9]. On the other hand, after the charge is framed the accused is given by the Legislature a clear right to cross-examine the witnesses under Section 256, Criminal Procedure Code This distinction clearly shows that the Legislature

[6] ILR 9 All 52 [8] AIR 1931 All 621

[7] AIR 1950 Pat550 [9] AIR 1929 Cal 822

did not intend proceedings in a warrant case before the framing of charge to amount to 'trial'. Again, it seems to me that whereas in proceedings before the framing of charge the Legislature provides that where the case has been instituted upon complaint the accused can be discharged if the complainant is absent but this can be done only at any time before the charge has been framed and not thereafter. Section 259 of the Code of Criminal procedure runs as follows:

> "When the proceedings have been instituted upon complaint and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, or is not a cognizable offence, the Magistrate may, in his discretion notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused."

The underlying idea behind this section is that as long as the proceedings amount to "inspire", the accused can be discharged due to the negligence of the complainant but this indulgence is not given to him when once the trial starts, because, as I have already said, when once the trial starts it; must end in conviction or acquittal and must be carried to its logical end. There can be no question of discharge in a trial. In this connection I would quote the following observations of a division Bench decision of the Patna High Court in case AIR 1929 Patna 644:

> "In other words a trial is a judicial proceeding which ends in conviction or acquittal. All other proceedings arc mere enquiries."

7. Further under Section 257, Criminal Procedure Code the accused has been given a further right to resumnmou any witness for the purpose of cross-examination under certain circumstances but this right is not given to the accused before the framing of charge. Thus Sections 254 to 257 of the Code of Criminal Procedure contain as it were the sine qua non of a trial and the necessary incidents with which a trial is replete.

8. A close examination of Sections 251 to 253, Criminal Procedure Code, clearly shows that the Legislature has not used the expression 'trial' in any of these sections . but has referred to proceedings contemplated by Sections 252 and 253 as merely a case. The word 'trial' is conspicuously absent from the provisions narrating the proceedings leading upto the framing of the charge. For the first time in Section 254, Criminal Procedure Code, the words used are "which such Magistrate is competent to try" which means that the trial would only begin after the charge is framed. On the other hand, in alt the provisions after the trial has begun namely, Sections 256 and 257 the word 'trial' has been used freely. In this connection the words 'claims to be tried' as used in Section 256 clearly indicate the beginning of the trial from that stage and this is the view that has been taken by a Division Bench decision of the Rajasthan High Court in case *Sarkar v. Madho Ram*[10], where their Lordships of the Rajasthan High Court held that trial starts only after the framing of charge mainly on the basis of these words in Section 256, Criminal Procedure Code The relevant observations of their Lordships of the Rajasthan High Court in this connection are as follows:

[10] AIR 1950 Raj 34

> "In warrant case I am inclined to think that the trial can be said to begin only after the charge is framed. According to Section 256, which occurs in chapter on 'Trial of Warrant Cases': it is only after the framing of the charge that the accused can claim to be tried."

9. Lastly, it seems to me that an examination of the provisions of Section 403, Criminal Procedure Code, also throws some light on the question. The words used in Section 403, clause (1) are 'a person who has once been tried by a Court of competent jurisdiction' indicating clearly

that the section applies only to trials and not to enquiries. The Explanation to Section 403 runs as follows:

> "The dismissal of a complaint, the stopping of proceedings under Section 249, the discharge of the accused or any entry made upon a charge under Section 273, is not an acquittal for the purposes of this section."

The explanation, therefore, clearly excludes discharge of the accused from the ambit of a trial. It is further clear that when the accused is discharged in a warrant case under Section 233 he cannot avail of the benefit of Section 403, Criminal Procedure Code Section 403 which is a specific section embodying the principle of autrefois acquit and relates only to trials clearly excludes proceedings leading up to the framing of charge. The logical inference from this is that such a proceeding cannot amount to 'trial'.

10. Finally a careful analysis of the provisions relating to the commitment enquiries and sessions trials clearly reveals the test which the Legislature has laid down in distinguishing 'inquiry' from 'trial'. Chapter XVIII has been clearly described as an, 'inquiry' by the Legislature and such an inquiry ends either with discharge under Section 209 or with the framing of charge under Section 210 and thereafter the trial starts. In my opinion while the Legislature has splitted up the two proceedings in cases exclusively triable by Sessions - one being inquiry and the other trial - these two stages seem to have been amalgamated and consolidated into one in the trial of warrant cases provided for in Chapter XXI of the Code of Criminal Procedure. In other words, proceedings leading upto the framing of charge is 'inquiry' and bears all the incidents of an inquiry whereas proceedings after the training of charge is 'trial' containing insignia of a trial, namely, the right to cross-examine, the right to give defense and the question of conviction or acquittal as the case may be. In this connection I am fully fortified by the observations of the Full Bench of the Allahabad High Court constituting of five Judges in case, ILR 9 All 52 (FB). The observations of their Lordships of the Allahabad High Court are as follows:

> "We think that in determining the effect to be given to Section 437, it is important to bear in mind the distinction obviously recognized in the Code between the preliminary proceedings in warrant cases that precede the drawing up of a charge which may be terminated by an order of discharge that does not amount to an acquittal, nor bar a second prosecution at the instance of the complainant, and those that ensue after charge framed and plea pleaded, which can only be concluded by an acquittal or a conviction, whereof the accused can afterwards avail himself under Section 403 of the Code. So long as the case continues in the stage of inquiry, the duty of the Magistrate is confined to ascertaining whether there is anything that the person accused ought to be called upon to answer. When once the charge has been framed and a plea has been taken, the inquiry is turned into a trial, and the evidence in support of the charge already recorded becomes evidence on that trial, subject to the right of the accused as declared in Sections 256 and 257."

11. The cumulative effect, therefore, of the reasons given by me above is no doubt that trial in a

warrant case can be said to commence only after the charge is actually framed and the accused is called upon to answer the charge. In summons cases, however, it is obvious that the trial commences when the accused is brought before the Court and when the particulars of the offence are explained to him as mentioned in Section 242, Criminal Procedure Code It is relevant to note that as no charge is framed in summons cases the provision relating to stating substance of accusation really takes place of a charge and, therefore, the trial starts at that stage. I may further point out that as the trial starts from the very inception in summons cases the Legislature has not made any provisions for the discharge of the accused and where the complainant is absent on the date of hearing the Court has been given the power to acquit the accused, whereas in warrant cases when the complainant in a complaint case does not appear until the framing of a charge the accused can only be discharged. This circumstance also supports the view that I have taken.

12. Having regard, therefore, to the view that I have taken in this case that trial starts only after the charge is framed and the accused is called upon to answer the charge, it follows that proviso (a) to clause (1) of Section 350 would not apply to proceedings before the framing of the charge and to the proceedings in the case before us. The view that I have taken in this case is amply supported by a large number of decisions of the various High Courts in India. A Full Bench decision of the Madras High Court reported in ILR 32 Mad 220 has taken this view and their Lordships observed in that case as follows:

> " 'Inquiry' is now defined in Section 4 (k) as including 'every inquiry other than a trial' conducted under this Code by a Magistrate or Court'. Trial begins when the accused is charged and called on to answer and then the question before the Court is whether the accused to be acquitted or convicted and not whether the complaint is to be dismissed or the accused discharged."

In the case before their Lordships of the Madras High Court the question was regarding the scope of Section 436, Criminal Procedure Code, in a case where the accused person was discharged by the Magistrate under Section 253. If the proceedings before the framing of a charge were held to be 'trial' then the Sessions Judge would have no power to hold a further inquiry. Their Lordships after a careful consideration of the matter observed as mentioned above. This case was followed by a later decision of the Madras High Court in *Sriramulu v. Krishna Row*[11], and again in *Ramanathan Chettiar v. King Emperor*[12], The Madras High Court, therefore, has consistently been taking the view that 'trial' starts only after the framing of charge. To

[11] ILR 38 Mad 585: AIR 1915 Mad 23

[12] AIR 1923 Mad 660

the same effect is a Division Bench decision of the Madhya Bharat High Court reported in AIR 1953 Madhya Bharat 1. The same view was taken by another decision of the Nagpur High Court reported in *Tukaram v. Emperor*[13], The Rajasthan High Court also in AIR 1950 Rajasthan 34 took the same view. The Allahabad High Court also expressed the same view in a Full Bench decision reported in ILR 9 All 52. Finally a Single Bench of this Court in Criminal Revn. No. 81 of 2011 D/- 23-5-1955 (J and K) took the same view relying upon the Madras authorities and we find ourselves in complete agreement with the view expressed by the learned Chief Justice in that case. The view that has been taken in this case also receives great support from a Full Bench decision of the Rangoon High Court reported in AIR 1931 Rangoon 225 and a Division Bench decision of the Patna High Court reported in AIR 1929 Patna 644. So far as the Calcutta High

Court is concerned a Full Bench decision of that Court in ILR 15 Cal 608 took, more or less, the same view and which view, as I have already pointed out was accepted by the Legislature in 1892 by amending definition of the word 'inquiry' so as to exclude 'trial'. In that case Wilson J. with whom three Judges agreed observed as follows:

> "The definition in the interpretation clause is very wide and in some sections of the Act it certainly includes trial. If that meaning were adopted here, it might be that Section 437 would authorize a Sessions Judge or District Magistrate, not only to order further enquiry preliminary to trial, but also to order a charge to be framed and the trial of that charge to proceed. The word is often, however, used in a more specific sense, to denote the enquiry before a Magistrate preliminary to trial, which regularly results in a charge or a discharge. I am not prepared to adopt any but the narrower sense in the present section." I, therefore respectfully agree with the view taken in the decision mentioned above on the question at issue.

13. I am, however, aware that some Courts in India have taken a contrary view and I would now try to review these decisions which have been cited before us by the learned counsel appearing against the reference. In the first place, great reliance was placed on a Division Bench decision of the Calcutta High Court in case, ILR 25 Cal 863. In that case their Lordships of Calcutta High Court no doubt observed that 'trial' commences when the case was called on with the Magistrate on the Bench and the accused in the dock. Their Lordships do not, however, seem to have entered into a complete discussion of the question and their attention was not drawn to the Full Bench decision reported in ILR 15 Cal 608 where majority of the Judges constituting the Full Bench had taken a contrary view. With very great respects to their Lordships I am unable to agree with the view expressed by them.

14. Another decision which takes a contrary view and which has been relied upon by counsel for the accused is *Dagdu Govindset v. Punja Vodu Wani*[14], In this case also their Lordships of the Bombay High Court do not seem to have entered into a detailed discussion of the subject and they have not considered the various aspects which I have pointed out in an earlier part of the judgment. Moreover, the decision given by their Lordships rests mainly on their experience and on the practice which prevailed

[13] AIR 1936 Nag 153
[14] AIR 1937 Bom 55

in the Bombay Presidency. In this case Broomfield J. observed as follows:

> "But according to my experience of the administration of criminal justice in this Presidency, which is not inconsiderable, the Courts have always, accepted the definition of trial which has been given in ILR 25 Cal 863, that is to say, 'trial' has always been understood to mean the proceeding which commences when the case is called on with the Magistrate on the Bench, the accused in the dock and the representatives of the prosecution and defense, if the accused be defended, present in Court for the hearing of the case."

Their Lordships of the Bombay High Court dissented from the Madras view but have not given any cogent reasons for doing so. This case was followed in a later decision of the Bombay High Court in *Ramchandra Narhar v. Emperor*[15], where also their Lordships of the Bombay High Court took the same view but at the same time realised the force of the reasoning adopted by the Judges of the Madras High Court. Their Lordships, however, did not pursue the matter further because they found themselves bound by the earlier decision of the Bombay High Court. In this connection Beaumont C. J. observed as follows:

> "The view, which the Madras High Court has taken, in ILR 46 Mad 719 : AIR 1923 Madras 660 is that a trial only commences when the Magistrate frames a charge, and the accused claims to be tried under Section 256, and there is no doubt a good deal to be said for that view. On the other hand, the Lahore High Court in *Sahib Din v. Emperor*[16], and the Court of the Judicial Commissioner in Sind in *Labh Singh v. Emperor*[17], have taken the opposite view. We. are told by counsel that the matter has not been considered by this Court. But in point of fact there is a decision of this Court directly in point in ILR (1937) Bom 211: AIR 1937 Bombay 55 .....
> ... ...
> ... .

Whatever view we might have taken had the case been free from authority, I think we ought to follow ILR (1937) Bom 211: AIR 1937 Bombay 55." It is, therefore clear that none of the two Bombay judgments are based on an independent consideration of the question and we express our most respectful dissent from these two decisions.

15. Reliance was also placed on a Division Bench decision of the Lahore High Court in case AIR 1922 Lahore 49. In this case also it appears that their Lordships of the Lahore High Court noticed decisions which took a contrary view but they explained them away on the ground that these decisions referred to Section 436 without, however dwelling on the reasoning given by those decisions. As I have already pointed out, provisions of Section 436, Criminal Procedure Code, are of great importance in judging the import of an "inquiry"' and their Lordships of the Lahore High Court have not considered this aspect. Nor the attention of their Lordships seems to have been drawn to the various aspects to which I have referred in an earlier part of the judgment. With great respects for the reasons given by the learned Judges

[15] AIR 1944 Bom 14
[16] ILR 3 Lah 115: AIR 1922 Lah 49
[17] AIR 1934 Sind 108

in that case we are unable to follow that decision.

16. The last case relied upon by counsel appearing against the reference is a Division Bench decision of the Sind Judicial Commissioner's Court, AIR 1934 Sind 106. A careful examination of this decision shows that one of the main reasons which led their Lordships to hold that 'trial' starts from the stage mentioned in Section 252 was the language of Section 251 which runs as follows:

> "The following procedure shall be observed in the trial of warrant-cases."

Their Lordships laid great stress on the expression 'trial' appearing in Section 251. This in my

opinion is not conclusive on the matter, because the word 'trial' in that section has been used rather loosely and the word had to be so used, because the section deals with the whole procedure which is to happen from the commencement down to conviction and there is no doubt that at a certain stage it has to amount to a trial. In this connection I would refer to the observations made by Ottar J. in AIR 1931 Hang 225 which are as follows:

> "The word 'trial' appears in Sections 241 and 251 which refer to the procedure to be observed 'in the trial of summons cases and warrant cases respectively'. These sections deal with the whole procedure in such cases, and include provision for what is to happen from the commencement down to conviction or acquittal."

I find myself in complete agreement with the view expressed by Ottar J. in that case. Another reason given by the Sind Court is that after the change introduced in the Code of 1882 by dropping definition of the word 'trial' the scope of Section 350 was enlarged. I am, however, unable to agree with this reasoning. The mere fact that the definition of the expression 'trial' was dropped by the Act of 1882 does not show that the Legislature intended that 'trial' should be understood in a different sense. I would prefer the reasoning given by the Madhya Bharat High Court in AIR 1953 Madhya Bharat 1 which I have already quoted else where. Their Lordships further held that by the amendment of 1892 it was doubtful if the intention was to give effect to the judgment of Wilson J. in the case reported in ILR 15 Cal 608 (FB). The only reason given for this by their Lordships is that the Legislature has not reverted to the old definition of "trial". This reasoning also does not appeal to me. Moreover, their Lordships of the Sind judicial Commissioner's Court did not consider the various aspects to which I have adverted in an earlier part of the judgment. Finally their Lordships of the Sind Chief Commissioner's Court do not seem to have attached any importance to the words 'claims to be tiled' appealing in Section 256 which support the view taken by me to a great extent. For these reasons we express our most respectful dissent from this decision also.

17. The position therefore is that while there are four Full Bench decisions namely, the Madras. the Allahabad, the Calcutta and the Rangoon High Courts in support of the view that I have taken in this case, there is no Full Bench decision which takes a contrary view. The other decisions which
I have already referred to above either do not deal with the question extensively or have adopted a line of reasoning which, in my opinion, seems to be inconsistent with the scheme and purport of the Code of Criminal Procedure.

18. On a careful consideration, therefore, of the authorities and analysis of the various provisions of the Code I am of the opinion that 'trial' in a warrant case commences only when the charge is read to the accused and he is called upon to answer the charge and until the proceedings have reached this stage proviso (a) to clause (1) of Section 350 does not come into play and the accused has no right to ask the Court to resummon the witnesses. In the present case, it appears, the case is yet at an inquiry stage, and therefore, the Magistrate was not right in acceding to the prayer of the accused. Had the Magistrate exercised his own discretion under Section 350, clause (1) in resummoning the witnesses the matter would have been different. This the Magistrate has not done but it is still open to him to apply his mind to this question.

19. For the reasons given above the reference is accepted, the order of the Magistrate dated 25-7-1958 is set aside and the case is sent back to the Magistrate who will now proceed with the case from the stage it was left by his predecessor.

Janki Nath Wazir, C. J.

20. I agree.

Gopalakrishnan Nair, J.

21. I agree.

Reference accepted.