

In Re: Mukund Bhaskarshet

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Court : Mumbai

Decided On : Aug-13-1906

Reported in : (1906)8BOMLR694

Judge : Aston and ;Beaman, JJ.

Appeal No. : Criminal Revision No. 125 of 1906

Appellant : In Re: Mukund Bhaskarshet

Judgement :

Aston, J.

1. The Criminal Procedure Code does not require notice to be given to an accused person before a further inquiry is ordered under Section 437. It is a matter of discretion dependent on the circumstances of each case. See In re Ruxmani Bhogilal (1904) 6 Bom. L.R. 479.

2. The argument that such an order under Section 437, Criminal Procedure Code, is one to the prejudice of an accused person and therefore notice is always necessary, is in my opinion answered by the fact that the Criminal Courts are daily making orders not less to the prejudice of accused persons in the initial stage of prosecutions, such as issuing orders for arrest, without previous notice, under authority of the Code.

3. Again a dismissal of a complaint under Section 203 or a discharge under Section 253 is not an acquittal such as operates to prevent a fresh trial, without the dismissal or discharge being set aside, see Section 403, Criminal Procedure Code, and see also *Queen-Empress v. Shankar* ILR (1888) 13 Bom. 384 so that the District Magistrate could have entertained a fresh complaint and have issued process, without notice to the accused. But the District Magistrate professed to proceed under Section 437 of the Criminal Procedure Code and on the materials before us, I am of opinion that this is a case in which the Magistrate ought, in the exercise of a proper discretion, to have given the accused an opportunity to be heard before directing further enquiry under Section 437, Criminal Procedure Code. I am also of opinion that it was irregular on the part of the District Magistrate to pass the order which he has done, without examining the record of the case which does not appear to have been before him when he made his order.

4. I would accordingly set aside the order of the District Magistrate and direct him to proceed according to law.

Beaman, J.

5. I think the order is bad for two reasons. First that no notice was given to the accused, second that it was not passed on the record. It is true that Section 437 does not compel a Magistrate to issue notice, and an order passed under that section without having issued notice is not illegal. But it is a fundamental principle of the administration of English justice that no order to the prejudice of an accused person should ordinarily be made without giving him an opportunity of being heard in his defence. And the mere omission from the section of any direct and positive command to give invariable effect to that principle was never meant to absolve Magistrates from doing so in all ordinary cases. There might be exceptional circumstances in which public expediency required the Magistrate to dispense with the issue of notice, and in order that when such cases do occur, this may be done the Legislature has, we must presume, advisedly framed the section in such a way as to leave the Magistrate a discretion. But cases of that kind must be extremely rare, and where there is no special and urgent reason, Magistrates should never depart from the rule *Audi alteram partem*. My learned colleague has described the

second ground upon which I think the order bad as an irregularity. I would go further. In my opinion passing an order under Section 437 without having the record, is an illegality and the resultant order is without jurisdiction and of no effect.

6. For these reasons I would set the order of the Magistrate aside, and leave him to proceed according to law.

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