**In Re: Arulay**

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**SooperKanoon Citation** : sooperkanoon.com/813007

**Court** : Chennai

**Decided On :** Oct-23-1925

**Reported in** : AIR1926Mad815; 94Ind.Cas.707

**Appellant** : In Re: Arulay

**Judgement** :
ORDER

**Jackson, J.**

1. The petitioner seeks to revise an order of acquittal in C.C. No. 60 of 1925 on the file of the Court of the Second Class Magistrate of Sivaganga. After the case was charged, there was a transfer of Magistrates, and in exercise of his privilege under Section 350, Criminal P.C., the accused asked that the prosecution witnesses might be re-summoned and reheard. When they appeared, he said he would be content to cross-examine them. The question raised is whether his original application had the effect, as it were, of cancelling the evidence recorded by the Magistrate's predecessor, so that on the adjourned date of hearing the only course was to examine the witnesses afresh, or whether on the contrary the accused could change his mind and leave the Court free to exercise its statutory option and act upon the evidence recorded by its predecessor. The petitioner relies upon the rulings in Sobh Nath Singh v. Emperor 12 C.W.N. 138 in which it was held, no doubt, that the accused has no right to change his mind.

2. My difficulty in following these rulings is that they seem to assume that the ordinary procedure under the Code when the Magistrate is transferred in the course of the hearing, is a re-trial, and if there is no re-trial, the accused must beheld to be gravely prejudiced.

It is impossible to say that the accused have not been materially prejudiced by the procedure adopted; for it is evident that the Honerary Magistrate has arrived at the conclusion on the evidence the whole of which was not recorded by himself, page 139. If the law requires that there should be a trial de novo on the transfer of a case from one Magistrate to another the waiver of the accused goes for nothing:

3. Deputy Legal Remembrancer v. Upendra Kumar Ghose 12 C.W.N. 140. The short answer to these observations is that the law requires no such thing, and if an accused is materially prejudiced by the Magistrate passing judgment on his predecessor's record, it is a prejudice by the Statute. It would be a very different case if the statute forbade the Magistrate to act upon this record and the accused was induced to plead that he would allow the recorded evidence to go in spite of the statute. That was the point in In re K.K. Ummar Hajee A.I.R. 1923 Mad. 32., which has no reference to Section 350.

4. If a Magistrate acting under Section 350, Sub-clasue (1), says that he is prepared to act on his predecessor's record, and the accused states that he does not wish to press his privilege under Sub-clasue (1)(a), but would like some witnesses re-called for cross-examination, it could be done quite regularly under Section 540, Criminal P.C. Of course in that case it would still be open to a superior Court to consider whether a material miscarriage of justice had resulted from the act that the Magistrate who convicted had not seen and heard the witnesses, but his procedure could not be said to have been ipso facto irregular.

5. In Narayan Reddy v. Enmula Bojamma A.I.R. 1925 Mad. 1280 on which petitioner also relies, it seems that the accused exercised his privilege under the proviso and the Magistrate confined him to cross-examination which was clearly wrong. The present is a case where the accused did not exercise his privilege. Of course the complainant has no privilege under Section 350, and if the accused declines to act under Sub-clasue (1)(a), the complainant of necessity must suffer

any disadvantage which follows upon the Magistrate electing' to proceed upon the evidence already recorded. To try to get an acquitted man again put upon his trial, because he failed to insist upon the prosecution witnesses being re-heard is a recourse chiefly commendable for its ingenuity.

6. There is no ground of interference ; the petition is dismissed.