State Through Ram Laut And Ors. vs Bansu And Ors. on 25 April, 1950

Equivalent citations: AIR1950ALL669

JUDGMENT

Sankar Saran, J.

1. The applicants in this case have come up in revision to this Court from an order of the learned Additional Sessions Judge of Juunpur dismissing an application that they filed before him. I propose to set out the relevant facts so that the point involved may be clearly stated.

2. On 5th July 1947, one Ram Laut filed a complaint against; the applicants under Section 325 read with Section 379, Penal Code, in the Court of the Sub-Divisional Magistrate, Jaunpur. On the same date, the Magistrate transferred the com-plaint to the Court of a Tahsildar Magistrate. The Tahsildar Magistrate took evidence under Section 202, Criminal P. C. and summoned the accused fixing 8th August 1947, for hearing. The case could not be taken up earlier and on 24th September 1947, the Tahsildar Magistrate examined a few witnesses for the prosecution, framed the charge and gave the applicants an opportunity to farther examine the prosecution witnesses. 10th October 1947 was fixed for this purpose, but on that date he reserved an order to transfer the case to the Court of a Special Magistrate, Shri Sundari Prasad, This case was put before Shri Sundari Prasad on 20th October 1947, and the applicants claimed a "de novo trial." Shri Sundari Prasad fixed 3rd 'November 1947, for the purpose, but as on that date the complainant was absent he dismissed the complaint and discharged the applicants. On that very date, however, the complainant filed a fresh complaint on those very allegations before the Sub-Divisional Magistrate of Jaunpur against the applicants. The Sub. Divisional Magistrate transferred this case also to the Court of Shri Sundari Prasad for disposal. In the meantime Shri Sundari Prasad ceased to be a Magistrate and the case was transferred to the file of another Magistrate Shri Srivastava. On 20th December 1947, Shri Srivastava summoned the applicants under Section 323 read with Section 379, Penal Code.

3. The applicants took the plea that the order of discharge of 3rd November 1947, amounted to an acquittal and the fresh complaint filed on the same date was barred under the principle of autre fois acquit. The learned Magistrate came to the conclusion that Section 403, Criminal P. C., was inapplicable to the facts of this case and overruled the applicants' objection.

4. The applicants went up in revision before the Sessions Judge who upheld the view of the Magistrate and dismissed the revision and refused to interfere with the order of the learned Magistrate.

5. The short point for determination is whether after the dismissal of the complaint by Shri Srivastava the applicants could plead autre fois acquit inasmuch as a charge had been framed against them and thereafter the proceedings terminated in their discharge. On a perusal of the provisions for the trial of summons cases-and of warrant cases it appears that whereas in summons cases Section 247, Criminal P. C., provides that in the event of the absence of the complainant on any date of hearing "the Magistrate shall, notwithstanding anything herein, before contained, acquit the accused" unless he-chooses to adjourn the hearing, in warrant cases he can merely discharge the accused. Even this power is restricted, Section 269, Criminal P. C. provides that in proceedings instituted upon complaint if "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, at any time before the charge has been framed discharge the accused."

The effect of the absence of the complainant has been the subject of difference of opinion in various Courts, but an acquittal cannot be presumed in such cases, In Narain Das v. Mewa Singh, 22 Cr. L. J. 312: (60 I. C. 1000 Lah,), the Lahore High Court expressed the view that it is the duty of the trial Court to proceed with the trial even in the absence of the complainant and to convict or acquit the accused on the merits. With this view, I am in respectful agreement.. The provisions for the discharge and acquittal of accused persons in warrant cases are laid down in Sections 253 and 258, Criminal P. C.

6. Generally speaking a Magistrate can discharge an accused before framing the charge. Acquittal follows when in a case where "a charge has been framed the Magistrate finds the accused not guilty". Obviously in this case there was no finding by the Magistrate that the accused was not guilty. Ha has just discharged the accused; because of the absence of the complainant. If it were a summons case, the absence of the complainant would have meant the end of the prosecution case because of Section 247, Criminal P. C., but in view of Section 259, Criminal P. C., in warrant cases, we cannot jump to the conclusion that there has been an acquittal.

7. That importance is attached to a decision arrived at after a charge has bean framed goes without saying and in these circumstances the termination of proceedings is generally treated as either an acquittal or conviction. Where the law is not codified, as in England, this matter has been considered in decided cases. In a recent case, Rex v. Thomas, (1950) 1 K.B. 26, elaborate-arguments were advanced and a detailed judgment was delivered by Humphreys J. on the question whether a plea of autre fois convict would apply where a person had been convicted of wounding with intent to murder and the person wounded subsequently died of the wounds inflicted. The learned Judge's view was that it would not if the person who inflicted the wound were indicted for murder. This view is on the lines of our own Criminal Procedure Code. The provisions of Section 403 (3), Criminal P. C. authorise prosecution in such cases.

8. In this cage learned counsel for the parties have referred to a large number of eases. It does not seem necessary to deal with them all as they have been considered in Desai J 's judgment. I shall discuss only one of them. In a secant ease, Yusofalli Mulla v. The King, A. I. R. (36) 1949 P. C. 264 : (50 Cr. L. J. 889), their Lordships of the Privy Council dismissed two appeals filed by the Government of Bombay against the judgments of the High Court at Bombay whereby two

prosecutions of the appellants for certain offences were held to be barred by person of the provisions of Section 403, Criminal P. C. the view that the trying Magistrate had taken of the case was that the accused had been previously tried and acquitted on exactly similar charges by a Court of competent jurisdiction. Their Lordships took the view that the sanction which was given for the prosecution was not valid and, therefore, the Court trying the case had become incompetent to proceed with the matter, and, as such, an order of acquittal would be without jurisdiction and would only operate as an order of discharge and a second trial of the accused would not be barred on the same facts.

9. The facts of this case are governed by the provisions of Section 350, Criminal P. C., which pro-vides for oases where the evidence has been partly recorded by one learned Magistrate and partly by another. The relevant portion of the section runs as follows :

> "(1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence is an inquiry or a 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 resummoned and reheard."

10. It would appear that the Code has definitely drawn a distinction between the powers of the Magistrate himself to summon witnesses and to recommence the trial and the right of the accused to demand the resummoning of the witnesses and of their being reheard. The power of the Magistrate are certainly wider because he can recommence the trial in which case all that had happened before the previous Magistrate would be wiped out and the case would start afresh. So far as the accused is concerned, his demand for the re-summoning and re-hearing of witnesses arises only when the Magistrate decides not to recommence the inquiry or trial, This view has found favour with several highest-Courts of appeal. The phrase "de novo trial'" is not to be found in the Code of Criminal PROcsdure, but a large number of cases have considered what it means. The meaning of 'de novo"' in Wharton's Law Lexicon is 'afresh; anew.' If the trial is to be afresh and anew, then everything previous to the commencement of the fresh trial is wiped out and I am m respectful agreement with the authorities that take this view.

11. Most of the cases on the subject have been dealt with by my brother Desai and I am in general agreement with his views. Accordingly I consider that this application should be-dismissed.

Criminal Revision No. 658 of 1948.

Desai, J.

12. This is an application by Bansu and others, who are undergoing trial under Sections 379 and 323, Penal Code, against an order of the Additional Sessions Judge rejecting their claim that their prosecution is burred cm the plea of autre fois acquit, the facts giving rise to this claim are as under.

13. The first complaint was filed against the applicants by the complainant-opposite party on 5th July 1947 and was sent to a Tehsildar Magistrate for trial. On 24th September 1947, the Tehsildar after hearing the prosecution evidence, framed a charge under Section 379, etc., against the applicants and fixed a date for cross-examination of the prosecution witnesses. But before that date the case was transferred to the Court of a Special Magistrate. the Special Magistrate took up the case on 20th October 1947 in the presence of the parties. The applicants claimed "de novo trial" and the Special Magistrate, granting the claim, ordered the complainant to produce his evidence on 3rd November 1947. On 3rd November 1947, the complainant absented himself and the Special Magistrate passed an order discharging; the applicants. On the same day the complainant filed another complaint on the same allegation in the Court of the Sub-Divisional Magistrate-who transferred it for trial to another Magistrate. That Magistrate summoned the applicants' in his Court. When they appeared before him they pleaded that whatever might have been the wording of the order of 3rd November 1947 of the Special Magistrate they were acquitted and consequently could not be put on trial again on the same allegations. The Court rejected their plea. The learned Additional Sessions Judge upheld the order of the Court.

14. The question for decision by us is, whether the charge framed by the Tehsildar on 24th September 1947 remained intact on 3rd November 1947 or not. If it remained intact, there could be no discharge of the applicants and the order of 3rd November 1947, though purporting to be of one discharge, must be treated as one of acquittal. There does not seem to be any controversy about this proposition of law. Very recently in Yusoof Ali Mulla v. Rex, A. I. R. (36) 1949 P. C. 264 : (50 Cr. L J. 889), 'the Judicial Committee observed that when a person is prosecuted without sanction, which was essential for a Court's taking cognisance of the offence Committed by him, and during the ferial it is discovered that the trial was invalid on account; of the want of sanction he should be "discharged" and not "acquitted" even if a charge has been framed against him. Discharge of an accused against whom a charge has been framed is so unsual that the observation of the Judicial Committee should be confined to the actual facts that were before their Lordships and the rule that a person can be discharged even if a charge has been framed against him should not be extended. That the applicants should be treated as having been acquitted on 3rd November 1947, their subsequent trial on a fresh complaint is barred under Section 403, Criminal P. C., there is no controversy on this matter as well. Whether the charge remained intact or not, is governed by the provisions of Section 350, Criminal P. C., and by what happened in the Court of the Special Magistrate on 20th October 1947.

15. Considerable confusion prevails in the minds of many Courts about what their rights and liabilities Eire when they get a part-heard case from another Court. This confusion is of their own creation, The language of Section 350 is quite plain and does not present any serious difficulties in its interpretation. The trouble is that many Courts do not care to read the provisions of Section 350 in order to ascertain what they can and ought to do and act under the erroneous impression that all that they have to do is to ask the accused whether he claims de nova trial. The words "de novo trial"

are not defined or used anywhere in the Code and many Courts do not have a clear idea of what they mean. Even reported cases show a conflict among the various High Courts about their meaning.

16. When a Court receives a part-heard case (from another Court, it is empowered by s 350 I to act on the evidence recorded by the previous Court or to re-summon the witnesses and recommence the inquiry or trial, provided that in any trial the accused may demand that the witnesses or any of them may be resummoned and reheard. It is for the Court to exercise its option either of acting on the evidence recorded by the previous Court or of re-summoning the witnesses and re-commencing the inquiry or trial. The proviso which gives the accused a right to demand that the witnesses or any of them may be resummoned and reheard applies only when the Court exercises the first option of acting on the evidence recorded by the other Court. It cannot apply when the Court selects the other option of recommencing the inquiry or trial and re-summoning the witnesses ; if the Court itself elects to resummon all the witnesses, there is no occasion for the accuseds' demanding that any of the witnesses be resummoned and reheard. It has never been suggested that the proviso would apply even when the Court elects to resummon the witnesses and recommence the inquiry, in order to compell the Court only to resummon the witnesses without recommencing the inquiry or trial. So the first act to be done by a Court on receipt of a part-heard case is to decide whether to act on the evidence already recorded or to re-summon the witnesses and recommence the inquiry or trial. If it decides to re-summon the witnesses and recommence the inquiry or trial, there would arise no question of applying the proviso. If it decides to act on the evidence already recorded, it must give some indication of its decision to the accused so that he may decide whether to avail himself of the proviso by demanding the resummoning and rehearing of the witnesses or any of them. As most of the Courts do not read Section 350, they do not follow this procedure and their failure to follow it causes most of the trouble that arises subsequently.

17. If the Court decides to resummon the witnesses and recommence the inquiry or trial, all the proceedings held in the previous Court; are wiped off. The effect is the same as if those proceedings were never held. If the previous Court framed a charge against the accused, that charge also would be wiped off. This is the view taken by most of the High Courts; see Sardar Khan Sahib v. Athaulla, 26 Cr. L. J. 510: A.I.R. (12) 1925 Mad. 174); Sheorajsai v. Dani, 32 Cr. L. J. 603 : (A. I. R. (18) 1931 Nag. 39); Abdul Hakim v. Haji Abdul Aziz, 35 Cr. L. J. 170 : (A. I. R. (20) 1933 Pesh. 78); Tuka Ram v. Emperor, 37 Cr. L. J. 983 : (A. I. R. (23) 1936 Nag. 153); Emperor v. Ganpat, 38 Cr. L. J. 15: (A.I.R. (23) 936 Nag. 220); Gajju v. Emperor, 39 Cr. L. J. 849: (A. I. R. (25) 1938 Oudh 247), Pir Moosa, Jan v. Bachayo, A. I. R. (28) 1941 sind 160: (43) Cr. L. J. 82); Daroga Choudhury v. Emperor, 20 Cr. L. J. 638: (A. I. R. (6) 1919 Pat. 578) and Jago Singh v. Emperor, 20 Cr. L. J. 820 : (A. I. R. (6) 1919 Pat. 311). A contrary view was taken in Sriramulu v. Veerasalingam, 38 Mad. 585: (A. I. R. (2) 1915 Mad. 23 : 15 Cr. L. J. 673); Bughta Simhadri Naidu v. Behara Sitharama, 17 Cr. L. J. 1 : (A. I. R. (3) 1916 Mad. 1048) ; Ramaswami Naiker v. Rangaswami, 48 Cr. L. J. 37: (A. I. R. (34) 1947 Mad. 245) and Raza Husain v. Emperor, 1935 A. L. J. 1022: (A. I. R. (22) 1935 ALL 834 : 36 Cr. L. J. 912). Sriramulu v. Veerasalingam, (38 Mad. 585 : (A. I. R. (2) 1915 Mad. 23 : 15 Cr. L. J 673) is the leading case; the others have followed it. In that case, a Court framed a charge under Section 500, Penal Code, against the accused, the case then went to another Court which recommenced the inquiry and discharged the accused and Ayling and Tyabji, JJ. held that the order, in effect, was of acquittal. The learned Judges remarked that the case was not free from difficulty, but on the whole

they were inclined to agree with Crown v. Nattu, 14 P.R. 1903 Cr.: (175 P. L. R. 1903), which laid down that a charge framed by one Court remains in force even when the succeeding Court recommences the inquiry or trial. They felt difficulty in understanding why the recommencement of the inquiry or trial should involve cancellation of the charge or transformation of the proceedings from a "trial" beck to an "inquiry". The view consistently taken by the Madras High Court, vide Lakshmireddi v. Munireddi, 32 Cr. L. J. 635 : (A. I. R. (18) 1931 Mad. 488) and In re Komma Hari Chandra Reddi, 39 Cr. L. J. 328 : (A. I. R. (25) 1938 Mad. 742), is that in a warrant case the proceedings are an "inquiry" up to the stage of the charge and become a "trial" only after a charge is framed. The same view was taken in Queen-Empress v. Chotu, 9 ALL 52 : (1886 A.W.N. 281 F. B.). Nagpur also adopted this view in one case--that of Tuka, Ram v. Emperor, (37 Cr. L. J. 983 : A. I. R. (23) 1936 Nag. 153). Other High Courts have refused to accept the proposition that a "trial" in a warrant case commences only when a charge is framed. In Gomer Sirda v. Queen Empress, 25 Cal. 863: (2 C.W. N. 465), Maclean C. J. stated at p. 865.

> "The 'trial' to my thinking means the proceeding which commences when the case is called on, that the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecution, and for the defence if the accused be defended, are present in Court for the hearing of the case."

In Labh Singh v. Emperor, 35 Cr. L. J. 1261: (A. I. R. (21) 1934 Sind 106) and Dagdu Govindshet v. Punja Vedu, I. L. R. (1937) Bom. 211: (A. I. R. (24) 1937 Bom. 55: 38 Cr. L. J. 250) the Courts dissented from the view taken in the case of Sriramulu v. Veerasalingam, (38 Mad. 585: A. I. R. (2) 1915 Mad. 23: is Cr. L. J. 673). In the case of Sheorajsai v. Dani, (32 Cr. L. J. 603: A. I. R. (18) 1931 Nag. 39), it was observed that a trial means a trial under Ch. XXI, Criminal P. C. I find it difficult to understand the division of the proceedings in a warrant case into "inquiry" and "trial"; there is nothing in the Code of Criminal Procedure, to warrant the conclusion that the framing of a charge marks the boundary between in "inquiry" and a "trial". On the contrary, the whole proceedings in a warrant case are designated as a "trial" in the Code. The High Court of Madras being committed to the view that the proceedings are an "inquiry" before a charge is framed and a "trial" after it is framed, the difficulty felt by the learned Judges in Sriramulu v. Veerasalingam, (38 Mad. 585: A. I. R. (2) 1915 Mad. 23: 15 Cr. L J. 673), case to see how a case having reached the stage of "trial" could be transformed into an "inquiry", can be understood. If the view that a "trial" commences only when a charge is framed is erroneous, as I, with great respect to the learn, ed Judges who adopt that view, think it is the difficulties felt by the learned Judges in the case of Sriramulu v. Veerasalingam, (38 Mad. 585: A. I. R. (2) 1915 Mad. 23: 15 Cr. L. J. 678) would disappear, and along with them, one of the principal reasons for the view that the charge remains intact even after the recommencement of an inquiry or trial.

18. If the subsequent Court elects to act on the evidence recorded by the previous Court, all that the accused can do is to demand that the witnesses or any of them should be recalled and reheard. There is a distinction between recommencing an inquiry or trial and re-summoning and re-hearing of witnesses, even if all the wit. nesses are recalled and reheard. This distinction would be obvious from even a cursory reading of Section 350. The re-summoning and re-hearing of witnesses on the accused's demand, which can take place only when the Court elects to act on the evidence already

recorded, does not amount to recommencement of the inquiry or trial and does not blot out all the previous proceedings. I am supported in this view by In re Vudigalapudigadu, 26 Cr. L. J. 526: (A. I. R. (12) 1925 Mad. 317), In re Komma Hari Chandra Reddi, (39 Cr. L. J. 828 : A.I.R. (25) 1938 Mad. 742); Pir Moosa Jan v. Bachayo, (A. I. R. (28) 1941 sind. 160: 43 Cr. L. J. 82), Kunwar Sen v. Emperor, 8 Luck. 286: (A. I. R. (20) 1933 Oudh. 86: 34 Cr. L. J. 124), Ramaswami Naiker v. Rangaswami (48 Cr. L. J. 97: A. I. R. (34) 1947 Mad. 245) and Raza Husain v. Emperor, (1935 A. L. J. 1022 : A. I. R. (22) 1935 ALL. 834. 36 Cr. L. J. 912). In the cases of Kunwar Sen v. Emperor, (8 Luck. 286: A. I. R. (20) 1933 Oudh, 86: 34 Cr. L. J. 121) and Pir Moosa v. Bachayo, (A. I. R. (28) 1941 Sind. 160 43 Cr. L. J. 82), the fact was emphasised that it made no difference whether all the witnesses were resummoned and reheard or only same of them. Panchanan Sarkar v. Emperor, 32 Cr. L. J. 243: (A. I. R. (17) 1930 Cal 666) and Sheorajsai v. Dani, (32 Cr. L. J. 603; A. I. R. (18) 1931 Nag. 39) contain observations suggesting that the re-summoning and rehearing of witnesses on the demand of the accused is same as the re-summoning of witnesses and recommencement of the inquiry or trial by the Court in exercise of its option. For example, Graham J. stated in the former case that the accused bas a right under the proviso to demand that the witnesses or any of them should be resummoned and reheard; or in other words, that there should be a de novo trial,"

> If de novo trial is not the same thing as recommencement of the inquiry or trial, I would have nothing to say against the observation of Graham J. In the other case Subhedar, A. J. C., stated at p. 604 that "Section 350 in effect lays down that the inquiry or trial has to be commenced the succeeding Magistrate in his discretion or the accused desires that it should be so that the necessary implication that the charge already framed has to be ignored."

With respects to the learned Additional Judicial Commissioner, I differ from the above observation so far as it makes the re-summoning of witnesses under the proviso synonymous with the recommencement of the inquiry in exercise of the Court's option under the main provision. The effect of re-summon and re-hearing the witnesses at the instance of the accused is to maintain intact the previous proceedings, particularly the charge if any was framed. If, when the Court proceeds to act on the evidence previously recorded, the accused considers that it would be in his interest that the Court should itself-flee and hear the witnesses, the proviso gives him the right to insist upon its being done. This seems to be the only purpose behind the proviso.

19. I have explained what the law is. What however, happens in practice cannot always be brought within the four corners of the law, partly because the Courts have a confused notion of what their rights and duties are and partly because they use language which is not to be found in Section 350 and is ambiguous. Considerable mischief is caused by their using the phrase "de novo trial" with reference to the exercise by the accused of his right under the proviso. If "de novo trial" means the recommencement of the inquiry or trial and if the phrase is used by Courts only in that meaning, there should not arise any difficulty. But frequently it is used by Courts with reference to the right of the accused given under the proviso. The Courts, instead of themselves exercising their option and leaving it to the accused to demand what is granted to him under the proviso, simply ask the accused whether he claims de novo trial and on his answering in the affirmative they recommence the inquiry or trial by re-summoning all the witnesses. The question then arises whether what they do is

in exercise of their own option or in meeting the demand of the accused under the proviso. The question arises because, a; explained above the effect of recommencement of the inquiry or trial is to blot out all previous proceedings, whereas that of simply meeting the demand of the accused made under the provision to keep intact the previous proceedings, I would like all Courts to follow the procedure correctly and to use the language used in Section 350. In the instant case the Special Magistrate did not expressly exercise his option, but straightway asked the applicants and they claimed de novo trial. The general view is that in such a case the Court must be deemed to have recommenced the inquiry or trial in exercise of its option. See Bughta Simhadri Naidu v. Bchara Sitharama, (17 or. L. J. 1: A. I. R. (3) 1916 Mad. 1048); Sardar Khan Sahib v. Attaulla, (26 Cr. L. J. 510: A. I. R. (12) 1925 Mad. 174); Sheorajsai V. Dani, (32 Cr. L. J. 603: A. I. R. (18) 1931 Nag. 39); Abdul Hakim v. Haji Abdul Aziz, (35 Cr. L. J. 170: A. I. R. (20) 1933 Pesh, 78); Ramalingam v. Emperor, 35 Cr. L. J. 363: (A. I. R. (21) 1934 Mad. 475); Tuka Ram v. Emperor, (37 Cr. L. J. 983: A. I. R. (28) 1936 Nag. 153); Emperor v. Ganpat, (38 Cr. L. J. 15: A. I. B. (23) 1936 Nag. 220); Gajju v. Emperor, (39 Cr. L. J. 849: A. I. R. (25) 1938 Oudh 247); Daroga v. Emperor, (20 Cr. L. J. 638: A. I. R. (6) 1919 Pat. 578) and Jago Singh v. Emperor, (20 Cr. L. J. 820: A. I. R. (6) 1919 Pat, 311). My researches have brought out only two cases, namely, Ramaswami Naiker v. Rangaswami, (48 Cr. L. J. 97: A. I. R. (84) 1947 Mad. 245) and In re Venkata Narayana, 38 Cr. L. J. 637; (A.I.R. (24) 1987 Mad. 448), in which the opposite view was taken. In the former case, de novo trial claimed by an accused was treated as the resummoning and rehearing of witnesses under the proviso, but even there this was done impliedly and not expressly. In the other case Pandrang Row J. observed that de novo trial "is not strictly speaking a new or fresh trial. All that it means is that the accused has the right to have all or any of the witnesses re-summoned and reheard by the new Magistrate."

20. In Cri. Misc. no. 248 of 1949, Shyam Behari v. Ramdas, decided by this Court on 21st April 1949, the Court asked whether the accused demanded de novo trial, the accused answered in the affirmative and Wanchoo J. was of opinion that the accused simply exercised his right under the proviso. The reason given by him is that he rauat be deemed to have asked for only what he could get under the law. His right under the law is restricted to demanding the re-summoning and rehearing of the witnesses; he has not the right to demand the resummoning of the witnesses and recommencement of the inquiry or trial. De nova trial means trial afresh or started again and it would be against the fact to treat de novo trial as marely resummoning and rehearing the witnesses. When the Court uses the phrase "de novo trial" which has no fixed meaning, (if really it has no fixed meaning), it is primarily to blame, but the accused, when he adopts the phrase and claims de novo trial, also makes himself responsible for using vague language, He cannot, when it suits his purpose, say that what he meant was not recommencement of the trial but simply re-summoning and rehearing of the witnesses under the proviso. If it is relevant to consider what the Court and the parties understood by de novo trial, and I think it is, there can be no doubt that they understood de now trial to mean the re-summoning of witnesses and recommencement of the trial. The Special Magistrate who dischared the applicants also understood the phrase is the same meaning; otherwise he would have "acquitted" them. The Court has to exercise its option first. When it grants de novo trial, it certainly means that it does not propose to act on the evidence already recorded. Since it has a choice of only two alternatives, it must mean the adoption of the other alternative-that of resummoning the witnesses and of recommencing the inquiry or trial. It does so in consultation with the accused, but that does not mean that the accused has been given a right to demand

something more than what he could demand under the proviso. I think the sound view to take in such a case is that the Magistrate simply exercises his option in consultation with the accused and there is nothing in the law against this. If the accused is going to insist upon his right under the proviso when he finds that the Court proposes to act on the evidence already recorded, there will hardly be any use acting on the evidence and the Court may as well choose the other alternative of recommencing the trial. The Special Magistrate in the instant case found on inquiry from the applicants that nothing would be gained by his proposing to act on the evidence recorded by the Tehsildar and decided to resummon the witnesses and recommence the trial. Thereupon all the previous proceedings held in the Court of the Tehsildar, including the charge framed by him, were wiped off. The complainant was absent before any charge was frame by the Special Magistrate, and, whether the dismissal of the complaint was legally correct or incorrect, the order of discharge of the applicants rightly followed the dismissal of the complaint. There was no acquittal and the applicants could not plead autre fois acquit.

21. The application should be dismissed.