(1876) 06 CAL CK 0003

Calcutta High Court

Case No: None

The Queen		APPELLANT
	Vs	
Bholanath Sen		RESPONDENT

Date of Decision: June 15, 1876

Acts Referred:

- Criminal Procedure Code, 1898 (CrPC) - Section 297

Citation: (1877) ILR (Cal) 23

Hon'ble Judges: Morris, J; Macpherson, J

Bench: Division Bench

Judgement

Macpherson, J.
This is an application to the High Court u/s 297 of the Criminal Procedure Code.

2. The petitioner, Bholanath Sen, has been convicted by a Bench of Magistrates at Midnapore on two charges of breach of trust, u/s 409 of the Indian Penal Code. He was sentenced to two periods of imprisonment, amounting, in all, to two years rigorous imprisonment, with a fine of Rs. 1,000 and in default of payment of the fine six months additional imprisonment.

3. We are asked to quash the conviction on the ground of various substantial illegalities and irregularities, most of which are set forth in the petition presented to this Court.

4. The seventh of the grounds stated in the petition is, that it was illegal and improper that a certain Mr. Larymore should have been one of the Bench of Magistrates who tried this case. It appears to us that this is a good ground of objection, and that, under the circumstances, the presence of Mr. Larymore, who had a substantial interest in the prosecution, vitiated the proceedings, and makes it necessary that the conviction should be quashed.

5. The prisoner Bholanath Sen was the jailor of the District Jail at Midnapore, of which Mr. Larymore was the Superintendent at the time of the trial and at the time of the commission of the offences for which Bholanath Sen was tried. Bholanath Sen was Mr. Larymore''s immediate subordinate in the management of this jail, and the moneys, the receipt of which was the subject of the first charge, were drawn by him from Government on the strength of certain bills or vouchers which (although in fact incorrect) Mr. Larymore had been induced by the accused to countersign as correct; while as regards the second charge, which was for receiving payment for certain oil at a higher rate than he credited to Government, the defence was (and Mr. Larymore proved it to be true) that Mr. Larymore had himself sanctioned the sale at the rate with which the prisoner credited the Government.

6. The whole case was, that the prisoner, by deceiving and imposing upon Mr. Larymore, had fraudulently got the sums of money, the receipt and appropriation of which was charged against him as criminal breach of trust. Mr. Larymore being the Superintendent in charge of this Jail, and being connected in this manner with the sums which the prisoner was alleged to have misappropriated, it is evident that he was most substantially interested in the matter, and that he was by no means free from the possibility of pecuniary responsibility in respect of it. That being so, it was most unfortunate that the District Magistrate should have thought fit to select Mr. Larymore to sit as one of the Judges in the case.

7. The Magistrate says, that Mr. Larymore was friendly to the prisoner, and that it was with a desire to assist the prisoner that he put Mr. Larymore on the Bench. But the Magistrata really erred if he selected Mr. Larymore because he was supposed to be specially friendly to the prisoner, almost as much as he would have erred had he selected him for the opposite reason. A criminal prosecution is not in the nature of a friendly arbitration. It is a penal proceeding of a very grave and serious kind, in which it is impossible to proceed too strictly according to the rules prescribed by law. Connected as Mr. Larymore was with the prisoner in the very matters which were the subject of the trial, it is impossible that his sitting as one of the Judges could be right. It is one of the oldest and plainest rules of justice and of common sense that no man shall sit as judge in a case in which he has a substantial interest. That is the law of this country as much as it is the law of England. [See the decision of a Full Bench of this Court in the case of The Queen v. Hiralal Das 8 B.L.R. 422 and the cases there referred to. See also a very recent case in England--The Queen v. Meyer 1 Q.B.D. 173.

8. The District Magistrate says, that Mr. Larymore''s interest in the matter was very indirect. In this we cannot agree with him: for it is quite clear, even from the evidence given by Mr. Larymore himself, that he had a most distinct and substantial interest. Under certain circumstances it might have proved a direct pecuniary interest. The District Magistrate himself says as to the second head of charge,--"there is this to be said in palliation of it, that Mr. Larymore''s consent was obtained to the price, while the quantity sold was probably fixed in the accounts with a view to square the monthly statements."

9. We think that, were it on this ground alone, the conviction ought to be quashed.

10. But, in addition to this, there are several other very serious irregularities to which our attention has been called.

11. The Bench of Magistrates consisted of the District Magistrate, Mr. Harrison, Mr. Larymore, the Officiating Superintendent of the Jail, Dr. Bachelor and two native gentlemen, being a Bench of five. In the course of the trial, both Mr. Harrison and Mr. Larymore were examined as witnesses for the prosecution. Without saying that it is illegal for a Magistrate to give evidence in the witness-box in a case with which he is dealing judicially, it clearly is, on general principles, most undesirable that a Judge should be examined as a witness in a case which he himself is trying, if such a contingency can possibly be avoided. See the Full Bench case--The Queen v. Hiralal Das 8 B.L.R. 422--already referred to. The mere fact that Mr. Harrison and Mr. Larymore were necessary witnesses for the prosecution was a most cogent reason why neither of them should have been members of the Bench by which the prisoner was to be tried. Mr. Harrison was almost as much out of place on the Bench as was Mr. Larymore. For the whole alleged fraud was discovered by Mr. Harrison himself: the prosecution was initiated, and the Government pleader was instructed by him: and he was one of the most important witnesses for the prosecution. That being the District Magistrate"s position, we cannot conceive why he did not place the case (which is really a very important one) before some Magistrate in no way connected with it, who might have disposed of it himself, or might have committed the accused for trial to the Sessions, instead of going out of his way to have the case tried by a Special Bench composed of Magistrates, of whom two were manifestly objectionable.

12. In making these remarks, we do not say that a Magistrate is incapacitated from dealing with a case judicially, merely because in his character of Magistrate it may have been his duty to initiate the proceedings. We only say that it was wrong that the District Magistrate should deal with a case judicially when there was no sort of necessity for his doing so, when he had himself discovered the alleged fraud and initiated the prosecution, and when he was one of the principal witnesses against the prisoner.

13. Then, again, we find that after the case for the prosecution was closed and formal charges were drawn up, and the accused had given the names of the witnesses whom he intended to call, Mr. Larymore was deputed by his brother Magistrates to go and take the depositions of some of these witnesses. Mr. Harrison in his judgment says: "When the witnesses for the defence were named, most of them were connected with the jail. As it would certainly he said by whatever party they gave evidence against, that they had been tampered with, the Court suggested, and both sides agreed, that these statements had better be taken down at once in the presence of the agents of both parties and of one of the Honorary Magistrates, to guard against "subsequent deviation. Accordingly, they were questioned, and their answers recorded in this way on the 12th and 13th November, and the statements are placed with the record for the use of either party, though not

themselves as evidence." We are unable to understand what such a proceeding is supposed to mean. Here is a man being tried on a very serious charge, who names the witnesses whom he means to call. Thereupon "the Court" suggests that "to guard against subsequent deviation," the statements of these witnesses should be taken down at once in the presence of one of the Honorary Magistrates and of the prisoner"s agent. Accordingly, the statements are taken down by Mr. Larymore, and the depositions so recorded "are placed with the record for the use of either party, though not themselves as evidence." This was a most irregular and unfair proceeding. The Court had no possible right to receive from Mr. Larymore or from anybody else statements recorded after such a fashion, or to place these statements with the record, if they were not themselves evidence. As a matter of fact, these statements were taken down and were placed with the record, for the sole purpose of being used against the prisoner. And they are practically so used by the Magistrate, Mr. Harrison, who, in his judgment, says: "Now, Uma Churn Chatterjee"s evidence I have already said I consider quite unworthy of credit, and it will be observed that when his statement was taken before Mr. Larymore on November 13th, he was never questioned about these purchases or said anything about them."

14. In our opinion, the deputing Mr. Larymore to take in an irregular way the statements of the witnesses whom the prisoner meant afterwards to call in support of his defence, was most unfortunate. It was quite illegal and unjustifiable. The District Magistrate, Mr. Harrison, in his judgment, says, that when the Court suggested, "that these persons should be examined, at once in the presence of one of the Honorary Magistrates," both sides agreed "that this had better be done. And doubtless he relies on that agreement", as justifying and sanctioning what was done. So, as regards the objection taken to Mr. Larymore"s being on the Bench and to Mr. Harrison"s own presence there, he relies on the consent given by the prisoner in the first instance.

15. The District Magistrate has throughout these proceedings treated them very much as if they had been proceedings pending in a civil suit, and has lost sight of the wide difference which exists between a civil suit and a criminal prosecution. Criminal proceedings are bad, unless they are conducted in the manner prescribed by law; and if they are substantially bad in themselves, the defect will not be cured by any waiver or consent of the prisoner. When the irregularities are all unfavourable to the prisoner, as in our opinion they clearly were in the present case, it is impossible for any Court to consider a waiver consent as binding on him. It is the duty of Magistrates and all Criminal Courts to follow the procedure prescribed by law, and there is no law which sanctions their intentional departure from that procedure; and then attempting to protect themselves against the consequences of such departure by getting the accused person to say he consents to it. In the mofussil, most prisoners, not properly defended, would probably assent to any irregularity which the Judge or Magistrate trying him chose to suggest. There would be an end to all procedure if such an assent were held to warrant material and important irregularities.

16. But after all what really was the nature of the consent given by the prisoner as to the composition of the Bench? After the witnesses for the prosecution had been examined, formal charges were, on the 10th of November, drawn up, and the plea of "not guilty" was recorded. The accused gave the names of his witnesses, and the further hearing was adjourned to the 4th of December. In his judgment, Mr. Harrison says: "After the charge was drawn up, and the case resumed after the long adjournment for the defence, the accused''s Counsel objected to the composition of the Bench, both to Mr. Larymore''s presence on it and to mine. Except under the special circumstances of the case Mr. Larymore''s presence on the Bench might obviously be questionable, and hence before commencing the trial the accused and his pleaders were expressly asked, if they had any objection to the composition of the Bench, when they distinctly stated that they had none whatever, &c."

17. It is to be noted that the objection was raised and pressed, before the case had proceeded further than the point of drawing up formal charges and recording the plea of "not guilty;" also that before that time both Mr. Harrison and Mr. Larymore had given evidence as witnesses on behalf of the prosecution. But it is not stated, and there is nothing to lead us to suppose, that when the prisoner was asked whether he objected to the composition of the Bench, he was warned that Mr. Harrison and Mr. Larymore were both very important witnesses for the prosecution. The record of the case does not show that, when the prisoner was first brought before this Bench, he was asked whether he objected to its composition; except that Mr. Larymore deposes to the fact which is confirmed by Mr. Harrison in his judgment. It is a matter of comparatively little consequence whether it is recorded or not. But if the Magistrates really intended to rely on the prisoner''s consent, that consent ought to have been formally and accurately recorded at the time it was given.

18. On these grounds, and without entering into the other objections which the prisoner''s Counsel take to the conviction, we think it clear that there have been most serious and material errors in the proceeding in this case, which have been greatly to the prejudice of the prisoner. We, therefore, set aside the conviction and sentence, and order that the prisoner be discharged and that the fines, if paid, be refunded to him.

19. The Magistrate of the District, no doubt, had authority to direct that this case should be tried by a Bench of Magistrates. But a complicated and somewhat difficult case like this is by no means one which it is desirable to place before such a Court. And the result shows that this is so. The case is one in which the strictest accuracy is necessary: whereas the proceedings have been diffuse and loose in the highest decree. Moreover there is not one "judgment" by the Court, but a series of judgments, which to say the least of it is most inconvenient. Mr. Harrison writes the judgment (a most voluminous one) on the first charge, and says that he concurs with Mr. Larymore''s judgment on the second charge. Mr. Larymore writes a judgment on the second charge, and says he concurs in Mr. Harrison''s judgment on the first charge. Dr. Bachelor writes that he concurs in the judgments of Mr. Harrison and Mr. Larymore. And the two native Magistrates write a long

judgment of their own. All the five Magistrates however so join in signing in a regular way the final "finding and sentence " of the Court. The case comes before us under somewhat peculiar circumstances; for the prisoner availed himself (as to a portion of his case at least) of his right of appeal to the Sessions Judge. The appeal was unsuccessful, although he, in his petition, repeated his objections to the constitution of the Court which tried him. Notwithstanding that the appeal was dismissed, it appears to us that the irregularities on which we have dwelt are so serious and so important as to render it imperative on us even now to quash the whole proceedings.