

(1871) 07 CAL CK 0003

Calcutta High Court

Case No: Miscellaneous Criminal Case No. 80 of 1871

Bholanath Mookerjee
and Others

APPELLANT

Vs

The Queen

RESPONDENT

Date of Decision: July 24, 1871

Final Decision: Dismissed

Judgement

Paul, J.

In this case Mr. Cowell, on behalf of the prisoners who have been convicted, applied for the interference of this Court in the matter of their conviction, on the ground that certain witnesses whom these prisoners desired to call, and for that purpose prayed that subpoenas should be issued, were not subpoenaed by the Magistrate who tried the case. The Magistrate, in fact, refused to issue subpoenas, maintaining that the prisoners could not claim to call those witnesses as a matter of right. The Magistrate considered that, at the stage of the case at which the application was made, it was purely a matter of discretion with him to issue subpoenas, and, for reasons recorded in his judgment, he declined to exercise his discretion. The facts, so far as they are material to this application, are as follows:--

The case of the prosecution was closed on the 28th December last after having been adjourned once at least for the examination of witnesses other than those originally named by the prosecution. On the 31st of December, the Magistrate determined to try the prisoners summarily, and accordingly, on that day, put them on their defence. On the same day, that is on the 31st December, the several prisoners stated generally the nature of their defence, and named certain witnesses for whose attendance they demanded subpoenas. The subpoenas were duly granted, and the case seems to have been adjourned to the 12th of January." On the 12th January, certain witnesses were examined, and in consequence of the absence of some witnesses who had been subpoenaed, the case was adjourned till the following day. On the same day the prisoners put in an application, praying, amongst other things, to have some other

witnesses called and examined, and in substance demanded that subpoenas should be issued in respect of those witnesses. It does not exactly appear whether this application was made before the adjournment, or after it. In the absence of anything to show that the application was made after the order for adjournment, I must assume that the application was made while the case was judicially before the Magistrate, and before the adjournment was announced. For some reason, which does not appear on the record, the case was not taken up on the 13th, but on the 18th of January. Witnesses were examined on the 18th and 19th, and judgment was given on the 20th January, convicting the prisoners, the present applicants. I should also remark that it is stated in the affidavit which has been put in on behalf of the prisoners, and I see no reason to doubt the statement, that the witnesses, whose examination the prisoners demanded on the 12th of January, might have been served with subpoenas in a few hours, namely six hours: I conclude from this statement that, had the subpoenas been granted and served, the witnesses so summoned to attend might fairly have been expected to be present either on the 13th of January or the following day.

2. The prisoners urge before us that, under the circumstances which have transpired, they were absolutely entitled to subpoenas for the witnesses named in the application of the 12th of January, and I think it is clear that they had a right to have those witnesses summoned to attend, the prisoners running the risk of those witnesses arriving before the trial was concluded. I think the prisoners were entitled to have this clear right enforced, unless there is something in the Criminal Procedure Code to show that such a right is absolutely taken away by express enactment. Before I proceed to examine the provisions of the Code of Criminal Procedure applicable to this case, I would observe that an application for subpoenas upon witnesses is quite a different thing from an application for an adjournment. The former may be granted without the latter being either applied for or granted. One may exist without the other, and it is by no means necessary that both should co-exist. I make these remarks because the whole argument which tends to show that the prisoners had no right to have the witnesses named on the 12th January subpoenaed, proceeds on the basis that the issue of fresh subpoenas involved the adjournment of the trial.

3. Now, turning to sections 251, 252, and 253, I observe that section 251 runs as follows:--"The charge shall be read to the accused person, and he shall be asked whether he is guilty, or has any defence to make." Section 252 directs that if the accused person have any defence to make to the charge, he shall be called upon to enter on the same and produce his witnesses, if in attendance, and shall be allowed to recall and cross-examine the witnesses for the prosecution." This section certainly assumes that when a prisoner is put upon his trial he must go on with his defence then and there. Section 253 enacts as follows:--"The Magistrate shall summon any witnesses, and examine any evidence that may be offered in behalf of the accused person to answer or disprove the evidence against him, and may for this purpose at his discretion adjourn the trial from time to time as may be necessary." The language of this section, the Magistrate

shall summon witnesses, and may at his discretion adjourn the trial," must be clearly kept in view in dealing with the present case.

4. Now I take it that the prisoner, in making his defence at an adjourned hearing, is entitled to the privileges to which he would have been clearly entitled if the trial had" taken place as contemplated by section 252 at the time of the prisoners being put on their defence subject to this reservation that the accused persons could not claim as a matter of right a further adjournment. It is obvious that when a prisoner is put upon his trial and applies to have any witnesses subpoenaed, the Magistrate is, u/s 253, bound to summon those witnesses, though he is not obliged to adjourn the trial. It may well happen in a particular case where the trial is a protracted one, that the witnesses may arrive before the trial is concluded. As the accused person is entitled to have his witnesses summoned on the first day of the trial, I see no objection to his being entitled to have the same right enforced on the 2nd or any other day of his trial, provided he merely applies for subpoenas, and does not ask for an adjournment to enable his witnesses to arrive and be present in Court. I find no limitation in point of time stated in section 253, nor do the words of that section give rise to a clear or necessary implication to that effect. On the contrary, the language of that section by drawing a distinction between the Magistrate's duty in summoning witnesses which is declared to be imperative, and the power to grant an adjournment which is left discretionary, clearly indicates that the accused person is entitled as of right to have his witnesses subpoenaed. Discretion in such a matter must necessarily be out of place, for the Magistrate cannot be supposed to know before-hand the value or importance of the evidence to be given by a particular person. Now, in the present case, long before the trial was concluded, the Magistrate was of opinion that the discretion which was (as he thought) vested in him, should not be exercised, on the general principle that trials might be protracted to any length if such an application, as the prisoners made, were entertained. I fail to see how the exercise of discretion (assuming the matter was discretionary) in a particular case can be regulated by such general reasoning. If any general principle is to be involved in determining or defining discretion, I apprehend the Legislature would have acted on such general principle, affirmed it by a positive enactment, and declared it to be a positive law, and thus displaced discretion in the sense in which the word is understood from its provisions. Discretion must in all cases be exercised with reference to the particular facts of a given case; the exercise of discretion must not be capricious, as it appears to me to have been in this case. The right of a prisoner to have witnesses subpoenaed during the pending of a trial, which I may designate an ordinary and natural right, is not only not taken away by the terms of section 253, but affirmed, for the section declares that the Magistrate shall summon witnesses, upon the application of the prisoner, and he may adjourn the trial. The language used in the section shows distinctly that the grant of subpoenas need not be accompanied by an adjournment. Were it otherwise, the Magistrate's discretionary power to adjourn the trial would render his imperative duty created by the section also discretionary, and in cases in which caprice is substituted for discretion altogether nugatory.

5. By sections 227 and 375, which relate to prisoners put upon their trial before the Sessions Court, the prisoner is bound by the list of witnesses which he puts in at first, and he cannot call as a matter of right any witnesses other than those he has named in that list. That being the state of the law in a trial of greater gravity and importance, it is argued that we should assume that the spirit of the law of procedure is against allowing prisoners, in summary trials, being trials of less importance, to have witnesses called who were not originally named. I do not wish to enter into any lengthy discussion of this matter here, because it is obvious that all arguments drawn from analogy assume the existence of the same or similar circumstances; and further, where any positive law exists which applies to one class of cases, and does not by its terms embrace another and distinct class of cases, the only argument to be drawn is that the particular positive law was not intended to apply to the cases which are left out of its operation. If I were asked to assign a reason for the difference, I should say that abundant reasons exist and account for the difference in the law in the two classes of cases. It must be conceded that the interval of time which elapses between a commitment by a Magistrate, and a trial before the Sessions Judge, furnishes unscrupulous persons with the opportunity of concocting a fresh defence to be supported by false evidence through the medium of witnesses not previously named, and thus enables such persons, unless otherwise restrained, to take the prosecution by surprise. In Courts in which the power of cross-examination is rightly and ably exercised by a bar of trained and accomplished advocates, falsehood is readily exposed, and an invented tale is almost certain of detection; so that surprises rarely succeed, and truth generally triumphs over falsehood. It is, however, a matter of notoriety that the power of cross-examination is but feebly exerted in Mofussil Courts, and the art of eliciting the truth by searching and relevant questions is but imperfectly understood. The sifting of evidence is consequently far from exhaustive, and in fact oral evidence is tested and dealt with in a manner different to the treatment it receives in other Courts of original jurisdiction at the hands of advocates of higher legal attainments. These considerations may reasonably have induced the necessity of introducing into the Mofussil, in trials held by a Court of Sessions, a law of procedure, which either prevents, or reduces, the chance of surprise on the prosecution, and which averts the possibility of a defence, previously wholly unknown to the prosecution, being stated, and of evidence of witnesses, not previously named, subject to a special restriction, being adduced. Owing to the undoubted and radical defects existing in the ordinary Mofussil practice, precautionary measures recommend themselves to the Legislature on the ground of expediency, and I accordingly perceive sufficient reason for the introduction of a procedure in trials before a Sessions' Judge which contains provisions for the statement of the defence before trial, and requires the witnesses to be named to the committing officer. The dangers to be averted, on which I have dwelt, can scarcely attend a summary trial, which, according to section 252, should proceed without delay and *de die in diem* until its termination. Further I consider that we should put a liberal construction upon the law of procedure in favor of an accused person whose mouth is closed and whose liberty may, in any given case, be sworn away by an unscrupulous and remorseless enemy, and that the cause of justice demands, unless otherwise clearly restricted in its requirements,

that the fullest opportunity be given to an accused to lay his whole case before a Court which tries him.

6. To assign to section 253 the meaning which the Magistrate attaches to it, is to proclaim not a liberal, but (as it appears to me) a harsh and unreasonable construction; and to allow a Magistrate to deal according to his individual discretion with applications on behalf of prisoners to have witnesses summoned without asking for more during the pendency of a summary trial proceeding *de die in diem*, seems to me to be fraught with danger to the liberty of the accused and to be altogether inexpedient. Even when a case is closed and a Magistrate is about to deliver his judgment, should a witness for the defence, whose attendance has been anxiously expected, arrive, and such witness be tendered for examination, I should consider it incumbent on that judicial officer to take his evidence; and I am unwilling to believe in the possibility of such evidence being rejected on the ground of discretion. In every case the object should be to arrive at the truth, to enquire fully for that purpose, and then to deal out justice between the parties.

7. On the whole, then, I am of opinion that Mr. Cowell's contention is well founded; that the prisoners were entitled to have subpoenas issued upon the witnesses named on the 12th January. I hold that, according to the true construction of section 253, the Magistrate has erred in refusing to summon the witnesses named on the 12th January, and that the Magistrate, assuming he had the discretion he believes he had, has exercised that discretion unwisely and to the prejudice of the prisoners. I would therefore reopen the case, and order the Magistrate to allow the prisoners to complete their unfinished defence.

8. There is a special feature in the present case which I have not prominently noticed. It is this: the case for the prosecution as originally made was not complete and had to be supplemented by fresh evidence which was adduced at an adjourned hearing held on or about the 28th December. It is not likely that the prisoners, when called upon to state their defence on the 31st December, should have been able to give the names of all persons whom they might be able to call to rebut the further case made by the prosecution, and it is highly probable that subsequent enquiry brought to light the names of the other witnesses mentioned on the 12th January as persons who were able on their oath to answer the supplemental case put forward by the prosecutor.

9. If the matter complained of lay in the discretion of the Magistrate, I can hardly conceive a more incorrect and mistaken exercise of such discretion, as is evidenced by his refusal to comply, under the circumstances of this case, with the demand of the prisoners which forms the subject of this application. I regret much that I differ from my learned colleague, whose experience of the working of the Criminal Procedure Code is so much greater than my own. Constituted as the High Court is, my views in criminal cases must absolutely give way to the opinion of the senior Judge, and the result is that the judgment of my colleague will prevail and be the judgment of the Court. I have consequently the satisfaction of knowing that if my judgment is erroneous, it will, by reason of its being

inoperative, be wholly innocuous. The application is refused.

¹Section 253, Code of Criminal Procedure, is as follows:--"The Magistrate shall summon any witness and examine any evidence that may be offered on behalf of the accused person to answer or disprove the evidence against him, and may, for this purpose, at his discretion, adjourn the trial from time to time, as may be necessary."

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Before Mr. Justice Loch and Mr. Justice Glover.

The 9th September 1868.

In the matter of the Petition of Bhikha Roy.

Reference, u/s 434 of the Code of Criminal Procedure, from the Sessions Judge of Bhaugulpore.

The complainant, Dhotan Roy, lodged a complaint to the effect, that while he was engaged in reaping the crops of his holding in Mauza Ladhowna, the Accused and others interfered, assaulted him, and carried away his crops.

The case was referred for decision by the Magistrate of the district to the Deputy Magistrate, Moulvi Wajhalla Khan, who summoned the accused persons. The petitioner, one of the persons accused, appeared.

The Deputy Magistrate, after examining the complainant and the accused, and taking the evidence of the complainant's witnesses, sentenced the petitioner to pay a fine of Rs. 5, u/s 143 of the Indian Penal Code; or, in default of payment, to suffer five days" rigorous imprisonment; Rs. 25, u/s 379 of the said Code, or, in default of payment, to suffer fifteen days" rigorous imprisonment; and Rs. 20, u/s 352 of the aforesaid Code, or, in default of payment, to suffer ten days" rigorous imprisonment.

The Judge of Bhaugulpore referred the case to the High Court, recommending that the conviction be quashed on the ground of the illegality in not calling upon the accused to produce his witnesses u/s 252, Code of Criminal Procedure. He also called the attention of the High Court to the order of the lower Court, which, on three separate charges, was framed so as not to exceed 50 rupees fine, or one month"s imprisonment.

The judgment of the Court was delivered by

The case appears to be one which comes under the provisions of Chapter XV of the Code of Criminal Procedure, in which a summons on complaint ordinarily issues. Section 252 does not apply to cases which fall under Chapter XV, but section 266, which requires the Magistrate, should the accused deny the charge, to hear the complainant and his

witnesses, and also to hear the accused person and such witnesses as he shall produce in his defence. The form of summons attached to the Code does not require a party charged to bring his witnesses with him; but the terms of section 266, read with section 262, apparently suppose that the defendant's witnesses attend voluntarily and accompany the accused. We do not think there is any cause for the interference of the Court.