CRIMINAL REFERENCE.

Before Holmwood and Sharfuddin JJ.

1914

Jan. 16.

EMPEROR

v.

ASIRADDI MANDAL.*

Surety—Fitness—Grounds of rejection of sureties—Reasonableness of grounds—Pecuniary fitness—Want of control over principal—Criminal Procedure Code (Act V of 1898), s. 122.

The grounds on which a Magistrate has power to refuse to accept a security, under section 122 of the Criminal Procedure Code, must be such as are valid and reasonable in the circumstances of each case as it arises.

In re Sooboddhee (1) followed.

Ram Pershad v. *King-Emperor* (2) and *Adam Sheikh* v. *Emperor* (3) commented on.

Jalil v *Emperor* (4) *Jafar Ali Panjalia* v. *Emperor*(5) referred to.

Where the Magistrate found that the sureties, who were the brothers of a person bound down under s. 110 of the Code, were pecuniarily fit, but that the latter was a notorious dacoit and that there was a consensus of opinion in the neighbourhood that they would not be able to keep him in control :—

Held, that the ground of their rejection was not unreasonable in the circumstances.

ONE Elem Mandal was bound down by the Sub-divisional Officer of Basirhat, and directed to furnish security. His elder brothers, Asiraddi and Tasiraddi, the present petitioners, offered themselves as sureties. The Sub-Inspector of Basirhat thana reported that Asiraddi was a mukhtear's *mohurir* and had property,

* Criminal Reference No. 322 of 1913, by H. Walmsley, Sessions Judge of the 24-Parganas, dated Dec. 19, 1913.

(1) (1874) 22 W. R. Cr. 37.
(2) (1902) 6 C.W.N. 593.
(3) (1908) I.L.R. 35 Calc. 400.
(4) (1908) 13 C.W.N. 80.
(5) (1910) I.L.R. 37 Calc. 446.

but that he would not be able to keep a man like Elem Mandal, who was a notorious character and a dacoit, under control. The Magistrate, after holding a local investigation, rejected the sureties, on the 28th September 1913, on the grounds that Elem was a notorious dacoit and that "there is a consensus of opinion in the neighbourhood that the proposed sureties will not be able to keep him under proper control."

The Sessions Judge of the 24-Parganas was then moved, and he drew the attention of the Magistrate to the case of *Ram Pershad* v. *King-Emperor*(1). The Magistrate was willing to rectify the order and the Judge advised him to pass a fresh order. The same sureties were again offered and rejected by the Magistrate's successor, Babu A. C. Dutt, on the 12th December 1913, by an order, the material portions of which are as follows :—

"The sureties Asiraddi and Tasiraddi appear to be pecuniarily fit. The question is if pecuniary fitness is the only condition to be satisfied before accepting a surety. . . . . "

The Magistrate then referred to *Ram Pershad* v. *King-Emperor* (1) and *Jalil* v. *Emperor* (2) and continued.

"Thus unfitness of a surety is not limited to pecuniary unfitness. Mere solveney of surety is not sufficient. A surety undertaking a bond in terms of Form II, Sch. V, undertakes thereby to guarantee the good conduct of his principal, and his fitness to stand as surety must be judged chiefly by his ability to perform his contract of guarantee and to enforce the good behaviour of his principal. That this is the view of the Legislature is clear from the language of section 112, Criminal Procedure Code, which refers to the *character and class* of the sureties required. It is to be now decided if the sureties Asiraddi and Tasiraddi are of the *character and class* who can guarantee the good conduct of the prisoner Elem Mandal. From the examination of Asiraddi and Tasiraddi it will appear that prior to his conviction Elem was living with a prostitute near Arbalia Railway station, and that they had remonstrated with him but in vain. This would

(1) (1902) 6 C. W. N. 593. (2) (1908) 13 C. W. N. 80.

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show what sort of control they could exercise over Elem in the past, and what can be now expected of them, if they could not check their younger brother living with a prostitute though they remonstrated with him. I cannot expect that they can guarantee for his good conduct now. Besides Asiraddi is a pleader's clerk and presumably a tout. Under the circumstances I do not think, in the light of the ruling of the Hon'ble High Court, reported in 13 C.W.N., page 80, that either Asiraddi or his brother Tasiraddi is a fit person to stand as surety of the prisoner Elem for his good behaviour, and I, therefore, reject their petition."

The Sessions Judge thereupon referred the case to the High Court, under section 438 of the Criminal Procedure Code. The material portions of the letter of reference are stated below :—

"I consider that *there is an error on a point of law* in the reason for which these sureties have been rejected.

The reason given by the Magistrate is that they cannot control Elem Mandal, because one of them is a pleader's clerk "and presumably a tout," and they could not persuade him to give up a prostitute with whom he was living.

The Magistrate may be right in saying that the case in 13 C. W. N. page 80, detracts from the importance I attributed to *Ram Pershad* v. *Emperor* (1), although the case in I. L. R. 35 Calc. 400 follows *Ram Pershad* v. *Emperor*(1). But granted that moral fitness is the only question to be considered, I think the Magistrate is wrong in rejecting the petitioners. They are brothers of the man bound down, and there is nothing mentioned against their character. The prostitute matter is trivial, and the presumption that a pleader's clerk is a tout, and, therefore, unfit is not warranted."

Babu Panchanan Ghose, for the petitioners. The sureties offered were relations of Elem Mandal. This fact, far from being a disqualification, is a most useful and additional qualification: *Emperor* v. *Shib Singh*(2), *In re Abdul Khan*(3). The question in such cases is not whether a surety can supervise a person for whom he stands surety but whether he is a person of sufficient substance to warrant his being accepted:

(1) (1902) 6 C. W. N. 593. (2) (1902) I. L. R. 25 All, 131.
(3) (1906) 10 C. W. N. 1027.

Abinash Malakar v. *Empress* (1), *Ram Pershad* v. *King-Emperor* (2), *Jafar Ali Panjalia* v. *Emperor* (3). The case of *Jalil* v. *Emperor* (4) is distinguishable as the surety tendered there, was a member of the same gang.

No one appeared for the Crown.

HOLMWOOD AND SHARFUDDIN JJ. This was a reference made by the learned Sessions Judge of the 24-Parganas in a case in which the Magistrate has refused to accept certain sureties under section 122 of the Criminal Procedure Code, because he considered them unfit, the reason given by the trying Magistrate himself being because Elem, the person bound down, was a notorious dacoit, and there was a consensus of opinion that his brothers would not be able to keep him in control.

When the rule was first issued by the learned Judge in the Court below the Sub-divisional Officer, who was then in charge and who had tried the 110 case, rightly said that he would not reply to the rule until he had made a careful enquiry on the spot. He went out, he made a careful enquiry and he found as we have said. He made enquiries not only at the Fatelapur Hât but also at Baderia. But this did not satisfy the learned Judge who has referred the matter to us because another Sub-divisional Officer who succeeded the first has given some details by way of example in support of his predecessor's finding which the learned Judge thinks are not reasonable. One is the report of the police officer that Asiraddi Mandal is a *mohurrir* of some mukhtear. That of course may or may not be a ground against him. The learned Sub-divisional Magistrate in his report speaks of him

(1) (1900) 4 C. W. N. 797.
(2) (1902) 6 C. W. N. 393.
(3) (1910) I. L. R. 37 Calc. 466.
(4) (1908) 13 C. W. N. 80.

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as a pleader's clerk, and is clearly wrong in saying that the pleader's clerk is presumably a tout. But another example which he gives of their inability to control this man, is that, although they are his elder brothers, they could not induce him to get rid of a prostitute with whom he was openly living on the public road which practically caused a scandal to the family. But these are only instances, and we do not think the learned Judge is quite right in giving them as the only reasons in his statement of errors on a point of law which the Magistrate made. The real reason is the consensus of opinion in the neighbourhood, and we cannot say that this is an unreasonable ground.

There have been many apparently conflicting decisions upon this point, but the law now appears to have come back to the point at which it originally stood in the statute itself, and in the judgment of this Court delivered in the case of *In re Narain Soobodhee*(1). The statute merely says that the Magistrate may refuse to accept any surety offered under this chapter, for reasons to be recorded by him, that such surety is an unfit person, and in the case we have referred to in the Weekly Reporter it is laid down that the ground of refusal must be valid and reasonable. That is all. In the case of *Ram Pershad* v. *King-Emperor*(2), a Bench of this Court gave certain advice to the Deputy Magistrate, but without having the case argued before them and without issuing any Rule. It is impossible to conceive that this case should have been reported in the authorised law reports in the Indian Law Reports series, for it is not a judgment of this Court and cannot be held to be a ruling. It was cited, however, before another Bench of this Court to which one of us was a

(1) (1874) 22 W. R. Cr. 37. (2) (1902) 6 C. W. N. 593.

party, in the case of *Adam Sheikh* v. *Emperor* (1), and was followed by that Bench without any reference to another case which had been decided by Geidt and Woodroffe, JJ.,—*Jalil* v. *Emperor* (2). There long and considered judgments were delivered by both the Judges, and it was laid down that the unfitness of a surety for good behaviour, though it may not exclude the idea of pecuniary unfitness, is more concerned with the idea of moral unfitness. That was laid down by Mr. Justice Geidt, while Mr. Justice Woodroffe laid down that under section 122 the Magistrate has to determine whether a person offered as surety is a fit or unfit person; as the Legislature has not particularized any kind of unfitness the matter is left to the discretion of the Magistrate subject to the High Court's power of declaring in each case according to its own circumstances whether the order passed by the Magistrate is reasonable or not. These cases came up before another Bench of this Court in the case of *Jafar Ali Panjalia* v. *Emperor*(3), and after considering the apparent conflict between some of these rulings, it was again laid down, as was laid down in *In re Narain Sooboddhee*(4), that the ground of objection must be dealt with in each case as it arises. The head note seems to be rather misleading, for it is set out that where a surety is competent in a pecuniary sense, the fact that he is not in a position to exercise control over the person bound down so as to ensure good behaviour in future, is not a sufficient ground for his rejection. A perusal of the judgment shows that the learned Judges never laid down any such doctrine at all. They say that in this particular case the sureties are men of sufficient substance to pay Rs. 2,500, but they are not in the opinion of the Magistrate in a

(1) (1908) I. L. R. 35 Calc. 400.
(2) (1908) 13 C. W. N. 80.
(3) (1910) I.L.R. 37 Calc. 446.
(4) (1874) 22 W. R. Cr. 37.

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position to control the petitioner sufficiently to ensure his good behaviour in future. They do not say anything further about this ground, nor do they say that the complete want of control is not a reasonable and sufficient ground. On the contrary, they say that there may be other objections to a man becoming a surety although he is pecuniarily fit for the position, but these it is not possible to specify, and such an objection must be dealt with in each case as it arises.

We are, therefore, brought back to the original doctrine laid down in *In re Sooboddhee* (1) that the only thing we have to see is that the order in each case is reasonable and valid. It appears to us that the reason given by the Sub-divisional Officer who tried the case was a reasonable and valid one, even though the examples with which his successor endeavoured to support it may not meet with approval. We, therefore, decline to interfere with the order of the Magistrate. The papers will be returned to the lower Court.

E.H.M.

(1) (1874) 22 W. R. Cr. 37.