

CRIMINAL REFERENCE.*Before Jenkins C.J., and Teunon J.*

1914

Sep. 9.

EMPEROR

v.

SURATH.*

Commitment—Duty of Magistrate to examine witnesses not produced but whom the accused is prepared to produce after process—Application to summon witnesses and for time to file documents made after the commitment order—Criminal Procedure Code (Act V of 1898), s. 208—Practice.

A Magistrate is bound, before passing an order of commitment, to examine all the witnesses produced by the accused but not those whom he is prepared to produce after process obtained for their appearance.

Queen-Empress v. Ahmadi (1) referred to.

Emperor v. Muhammad Hadi (2) dissented from.

A Magistrate does not act illegally, under s. 208 of the Criminal Procedure Code, in refusing an application for summons on witnesses and for time to file documents, made after the order of commitment has been passed.

IN the course of a preliminary inquiry in a sessions case, held by the Sub-divisional Officer of Kishengunge, the prosecution witnesses were examined and cross-examined and the prosecution case closed on the 17th June 1914, and the Magistrate made the following order "I shall go through the record and pass the necessary orders tomorrow." On the next day an application was filed, apparently after the order of commitment to the Sessions Court had been passed, on behalf of the accused, praying the Court to

* Criminal Reference, No. 174 of 1914, by N. K. Dutt, Sessions Judge of Purnea, dated July 18, 1914.

(1) (1898) I. L. R. 20 All. 264.

(2) (1903) I. L. R. 26 All. 177.

summon some defence witnesses, a list of whom was offered to be put in at once, and to allow reasonable time for the filing of certain documents. The Magistrate, thereupon, recorded an order in these terms. "Accused are committed to the Court of Sessions to-day, no further adjournment can be allowed."

The case came on for trial before the Sessions Judge of Purneah, on the 18th July, when the accused took objection to the order of commitment as illegal, having regard to the provisions of s. 208 of the Criminal Procedure Code. The learned Judge, accepting the contention, referred the case to the High Court under s. 438 of the Code. The material portions of the Letter of Reference are as follows:—

"At the enquiry, prosecution witnesses were examined and cross examined, and the prosecution witnesses were finished on 17th June 1914, and the Court passed the following order:—"I shall go through the record and pass necessary orders tomorrow." On the following day, that is, the 18th June 1914, a petition on behalf of the accused was filed praying for examination of a few witnesses, a list of whom was to be filed at once, and to allow a reasonable time for filing documents. The Court ordered as follows:—"Accused are committed to the Court of Sessions to-day. No further adjournment can be allowed."

I think the order of commitment was wholly illegal. Under section 208 (1) of the Criminal Procedure Code it was imperative upon the Magistrate to take all evidence as might be produced on behalf of the accused, under the same section, sub-section (3), the Magistrate should issue process to compel the attendance of any witness or the production of any document, if the prosecution or accused applies for the same, unless for reasons to be recorded he deems it unnecessary to do so. The Magistrate cannot refuse to issue summons to compel the attendance of witnesses because he thinks that the case must be committed to the Sessions, for before coming to the conclusion that a case should be committed to the Sessions, he should weigh the evidence of both sides that might be adduced.

If he considers that the accused should be discharged on the evidence adduced on behalf of the prosecution, or if he thinks that the accused is guilty of grave *laches* in praying for summoning of witnesses, and for such other reason to be recorded, he may refuse to summon witnesses for the defence. It might be that after examining the witnesses for the

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defence and considering the documents filed on behalf of the accused, the Magistrate might come to the conclusion that the accused committed no offence, or committed an offence that should not be tried by the Court of Sessions. So in this case the Magistrate was bound to issue summons to compel the attendance of witnesses on behalf of the accused under section 208 of the Code of Criminal Procedure. As he did not do so the order of commitment was wholly illegal. The case of *Emperor v. Muhammad Hadi* (1) supports this view. The case of *Phanindra Nath Mitra v. Emperor* (2) cited by the Public Prosecutor, is not in point, as the accused in that case did not care to cross-examine the witnesses for the prosecution as their examination went on. So I think the order of commitment was illegal, and I, therefore, recommend that it may be quashed by the Hon'ble High Court under section 215 of the Criminal Procedure Code."

Mr. K. N. Chaudhuri and *Babu Manmatha Nath Mukherji*, for the accused.

No one appeared for the Crown.

JENKINS C.J. This is a Reference to the High Court by the Sessions Judge of Purnea, under section 438 of the Criminal Procedure Code, and the suggestion is that the law as prescribed in section 208 of the Criminal Procedure Code has not been observed. That view has been supported before us by Mr. Chaudhuri who has cited in support of it a decision in *Emperor v. Muhammad Hadi* (1). That case does not purport to go beyond the decision on which it is based, that is to say, the decision in *Queen-Empress v. Ahmadi* (3). But in fact it does enlarge the rule laid down in that case, in so far as it applies the rule in the earlier case, which was limited to witnesses produced, to witnesses whom the accused might be prepared to produce, and this enlargement is in conflict with the express terms of section 208. I cannot myself see that the Magistrate has in any way failed to observe the provisions of that section. It is not suggested that he did not hear all

(1) (1903) I. L. R. 26 All. 177.

(2) (1908) I. L. R. 36 Calc. 48.

(3) (1898) I. L. R. 20 All. 264.

the evidence produced before him, and that is all that is required by the first paragraph. The fact that an application was made on the date on which the accused was committed to the Sessions for the summoning of further witnesses appears to me to introduce no conditions which show that the provisions of that section had not been observed. It is important to notice that what was sought was that the Magistrate should allow reasonable time for filing documents and summoning witnesses. On that the Magistrate made the order that "the accused are committed to the Court of Sessions to-day; no further adjournment can be allowed." The application, therefore, was obviously too late for the commitment had been made. More than that, I think, in the circumstances of this case, that the accused is not deserving of any great sympathy because an application could have been made at once to this Court, under section 215, for the quashing of the commitment if the circumstances permitted it. But instead of doing that the accused waited until the case was called on at the Sessions and took this point a month after the event. In my opinion, we ought not to uphold this Reference, and we direct the Sessions Judge to proceed with the trial of the accused.

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TEUNON J. I agree.

E. H. M.