

## CRIMINAL REFERENCE.

*Before Mookerjee and Sheepshanks JJ.*

1916  
 May 24.

RAYAN KHAN

v.

EMPEROR.\*

*Surety*—Duty of Magistrate to inquire into fitness of each surety on evidence taken by him—Delegation of inquiry to the police or others—Rejection of sureties on a police report—Grounds of rejection—Want of control—Criminal Procedure Code (Act V of 1898) s. 122.

Under section 122 of the Criminal Procedure Code, a Magistrate must personally hold a separate inquiry as to the fitness of each surety and decide the matter on evidence taken for the purpose, and he cannot delegate to a police officer or other person the function entrusted by law to him alone.

*Suresh Chandra Basu v. Emperor* (1), *In re Abdul Khan* (2), *Akbar Ali Mahomed v. Emperor* (3) and *Kalu Mirza v. Emperor* (4) followed.

*Queen-Empress v. Pirithi Pal Singh* (5), *Emperor v. Tota* (6), *Emperor v. Ghulam Mustafa* (7), *Emperor v. Balwant* (8), *Bhawani Singh v. King-Emperor* (9), *King-Emperor v. Parmeshur* (10), *Ramanand Singh v. King-Emperor* (11), *Jai Gobind v. Emperor* (12), *King-Emperor v. Karm Khan* (13), *Imperator v. Mahro* (14), *Emperor v. Kamal* (15), *Imperator v. Allahdino* (16), *Emperor v. Haji Usman* (17), *Pir Abdulla v. Emperor* (18), *Muhammad Ibrahim v. Emperor* (19) approved.

Criminal Reference, No. 73 of 1916, by C. Tindall, Sessions Judge of Bankura, dated May 13, 1916.

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| (1) (1904) 3 C. L. J. 575.        | (10) (1904) 1 Cr. L. J. 459.  |
| (2) (1906) 10 C. W. N. 1027.      | (11) (1908) 8 Cr. L. J. 344.  |
| (3) (1914) I. L. R. 42 Calc. 706. | (12) (1912) 13 Cr. L. J. 760. |
| (4) (1909) I. L. R. 37 Calc. 91.  | (13) (1906) Punj. Rec. 18.    |
| (5) (1898) All. W. N. 154.        | (14) (1908) 10 Cr. L. J. 225. |
| (6) (1903) I. L. R. 25 All. 272.  | (15) (1908) 10 Cr. L. J. 230. |
| (7) (1904) I. L. R. 26 All. 371.  | (16) (1911) 12 Cr. L. J. 410. |
| (8) (1904) I. L. R. 27 All. 293.  | (17) (1910) 11 Cr. L. J. 497. |
| (9) (1914) 12 All. L. J. 1004.    | (18) (1913) 15 Cr. L. J. 378. |
| (19) (1914) 16 Cr. L. J. 100.     |                               |

Want of sufficient control over the person bound down is not a valid ground for the rejection of a surety.

*Kabu Mirza v. Emperor* (1), *Jiva Natha v. Emperor* (2), *Queen-Empress v. Rahim Bakhsh* (3) and *Sheikh Zikri v. Emperor* (4) referred to.

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THE facts of the case were as follows. A proceeding under s. 110 of the Criminal Procedure Code was instituted against one Rayan Khan and others in the Court of the Subdivisional Officer of Bankura, who by an order, dated the 1st December, 1915, bound down seven of accused, each in the sum of Rs. 200, together with two sureties respectively in the like amount, to be of good behaviour for one year, and in default sentenced them to rigorous imprisonment for the same period. Two others were similarly directed to execute bonds with sureties to be of good behaviour for three years with the alternative of rigorous imprisonment for such term.

On the 24th and 26th January, 1916, each of the accused produced two sureties who filed the title-deeds of their properties. The Magistrate, without himself holding an inquiry into the question of the fitness of the sureties, referred the matter to the police in the following terms :

“To police for inquiry if the surety is fit ; forward documents also.”

The Sub-Inspector of Police thereafter submitted the following report :—

“The proposed sureties are not fit. They have not sufficient control over the accused, and they have no sufficient (property) to pay the amount in case of default ; so under the circumstances I cannot recommend this.”

The Magistrate, thereupon, rejected the sureties offered by the accused and required them to furnish others instead, with the result that the persons bound down were sent to jail. On the 13th May, the Sessions Judge of Bankura referred the cases of nine of these persons to the High Court, under s. 438 of the Criminal

(1) (1909) I. L. R. 37 Cal. 91, 101. (3) (1898) I. L. R. 20 All. 206.

(2) (1914) 16 Bom. L. R. 138. (4) (1911) 12 All. L. J. 785.

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Procedure Code, recommending the reversal of the Magistrate's order refusing to accept the sureties.

No one appeared in the Reference.

MOOKERJEE AND SHEEPHANKS JJ. In a proceeding under section 110 of the Criminal Procedure Code, the petitioners were directed, on the 1st December, 1915, to execute bonds for Rs. 200 with two sureties each, to be of good behaviour for one year in some cases, and for three years in other cases, in default to undergo rigorous imprisonment for their respective periods. This order was made by Mr. H. K. Mullick, Subdivisional Magistrate, Bankura. On the 24th and 26th January, 1916, the petitioners produced two sureties each, who offered to stand as sureties, and filed documents of title relating to their properties. On the 28th January, the Magistrate recorded the following order: "To police for inquiry if the surety is fit; forward documents also." As the police did not submit the report on the day fixed, the case was adjourned. The Sub-Inspector of Police subsequently reported in the following terms: "The proposed sureties are not fit. They have not sufficient control over the accused and they have no sufficient (property) to pay the amount in case of default; so under the circumstances I cannot recommend this." The Inspector of Police forwarded this report to the Magistrate with the note "Not recommended." The Magistrate thereupon recorded the following order on the 11th February, 1916: "Rejected. Let them furnish other good surety." The result was that the petitioners were all lodged in jail. The Sessions Judge has now forwarded the records to this Court with the recommendation that the order of the Magistrate be set aside, on the ground that the sureties were rejected without judicial inquiry by the Magistrate himself.

It is well settled that the question whether a

particular person who is offered as surety is or is not fit, within the meaning of section 122 of the Criminal Procedure Code, must be decided by the Magistrate himself, and his decision must be based upon evidence taken for the purpose; sureties offered should not be refused except after judicial inquiry. This view is supported by a long line of cases in this Court which are binding upon us and our Subordinate Courts, *Suresh Chandra Basu v. Emperor* (1), *In re Abdul Khan* (2), *Akbar Ali Mahomed v. King-Emperor* (3), *Kalu Mirza v. Emperor* (4). In the case last mentioned, Coxe J. doubted whether the inquiry might not be delegated to a Subordinate Magistrate. Ryves J., however, followed what has undoubtedly been the consensus of opinion in all the superior Courts in this country, namely, that the Magistrate should himself hold the inquiry into the fitness of the proposed sureties, and cannot call upon other persons to exercise the functions which are entrusted by law to him alone. Amongst the cases in Allahabad, reference may be made to the decisions in *Queen-Empress v. Pirthi Pal Singh* (5), *Emperor v. Tota* (6), *Emperor v. Ghulam Mustafa* (7), *Emperor v. Balwant* (8), *Bhawani Singh v. King-Emperor* (9). The same view has been adopted in the Court of the Judicial Commissioner of Oudh, *King-Emperor v. Parmeshur* (10), *Ramanand Singh v. King-Emperor* (11), *Jai Govind v. Emperor* (12). A similar view has been adopted by the Chief Court of the Punjab, *King-Emperor v. Kaim Khan* (13); and also by the Court of the Judicial Commissioner of Sind, *Imperator v. Mahro* (14)

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*Emperor v. Kamal* (1), *Imperator v. Allahdino* (2), *Emperor v. Haji Usman* (3), *Piru Abdulla v. Emperor* (4), *Muhammad Ibrahim v. Emperor* (5). We accordingly accept the recommendation of the Sessions Judge, set aside the order of the Magistrate, dated the 11th February, 1916, and remand the case to him in order that he may inquire into the fitness of the sureties offered, upon such evidence as may be adduced before him on behalf of the accused. It may be added that, as there are several accused persons each of whom has offered two sureties, the fitness of each person must be separately determined. A general order without investigation of the circumstances of each of the sureties is obviously not contemplated by the law.

As the question of fitness of each surety will be determined by the Magistrate after inquiry, it is not necessary for us to specify the elements to be taken into consideration by him; but with reference to the observation in the Police report that sureties should be rejected if they do not show that they have sufficient control over the accused, we may draw the attention of the Magistrate to the fact that according to the decisions of this Court, this is not a valid ground for rejection of a surety, *Kalu Mirza v. Emperor* (6). The same view has been adopted by the Bombay High Court in a recent case [*Jiva Natha v. Emperor* (7)], though a somewhat different view is possibly indicated in *Queen-Empress v. Rahim Bakhsh* (8) and *Sheikh Zikri v. King-Emperor* (9).

Let the records be returned.

E. H. M.

*Case remanded.*

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