

CRIMINAL REVISION.*Before Greaves and Panton, JJ.*

JYOTSNA NATH SIKDAR

v.

EMPEROR.*

1923

Nov. 26.

Commitment to High Court—Application to cross-examine prosecution witnesses before the framing of charges and before the Magistrate had decided to commit—Right of cross-examination, before commitment, in such case—Criminal Procedure Code (Act V of 1898), ss. 208 and 347.

When an application to cross-examine the prosecution witnesses, during an enquiry preliminary to commitment, is made before the charges are framed and before the Magistrate has decided to commit to the Court of Sessions, he is bound to allow such cross-examination. He has no discretion, in such a case, to disallow cross-examination under section 347 of the Criminal Procedure Code.

Queen-Empress v. Sagal Samba Sajao (1), *Phanindra Nath Mitra v. Emperor* (2) and *Fazarali v. Mazaharulla* (3) referred to.

THE facts of the case were as follows. One Womesh Chunder Banerjee filed a complaint, under sections 467 and 471 read with section 120B of the Penal Code, against the petitioners and two others before the Chief Presidency Magistrate. The case was made over to Mr. Wajed Ali, who recorded the examinations-in-chief of six prosecution witnesses on the 21st and 28th May and 8th June 1923. On the 25th June the case was taken up by Mr. H. K. De and postponed to the 2nd July on which date the

* Criminal Revision, No. 939 of 1923, against the order of H. K. De, Additional Presidency Magistrate, Calcutta, dated Oct. 2, 1923.

(1) (1893) I. L. R. 21 Calc. 642. (2) (1908) I. L. R. 36 Calc. 48.

(3) (1911) 16 C. L. J. 45.

complainant was further examined-in-chief. On the 18th July he was recalled and his examination was continued. The two petitioners filed a petition, on the same date, for permission to cross-examine the prosecution witnesses, whereupon the Magistrate recorded the following order: "*I shall consider the application after the prosecution has closed their case.*" On the 26th July the complainant's examination was closed, and the evidence of four more prosecution witnesses recorded. On the 1st August one prosecution witness was examined, and the Magistrate then passed an order on the petition of the 18th July, which is set out in the judgment of the High Court. He committed all the accused to the High Court, on the 9th August, whereupon the petitioners obtained the present Rule on the third ground of the petition, *viz.*, that the proceedings should be set aside for refusal of the Magistrate to allow the accused to cross-examine the prosecution witnesses, and examine the defence witnesses.

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Babu Manmatha Nath Mookerjee (with him *Babu Probode Chunder Chatterjee*), for the petitioners. The petitioners had a right to cross-examine in this case. Refers to *Queen-Empress v. Sagal Samba Sajao* (1). The case of *Phanindra Nath Mitra v. Emperor* (2) is distinguishable, as an application was made there after the Magistrate had made up his mind to commit.

[PANTON J. referred to *Fazarali v. Mazaharulla* (3).]

It is in my favour.

No one appeared for the Crown.

(1) (1893) I. L. R. 21 Calc. 642. (2) (1908) I. L. R. 36 Calc. 48.

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GREAVES AND PANTON JJ. In this case a Rule was issued at the instance of the accused calling upon the Chief Presidency Magistrate to show cause why a certain order should not be set aside on ground No. 3 as stated in the petition. The accused were charged under sections 120 B, 467 and 471 of the Indian Penal Code. Six witnesses were examined on behalf of the complainant on the 21st and 28th of May and on the 8th of June. On the 2nd July the complainant, who had already been partly examined, was further examined. The complainant was recalled on the 18th July and was examined, and on that date the accused applied before the Magistrate for permission to cross-examine the prosecution witnesses, and they filed a written application. The Magistrate directed the application to be filed, stating that he would consider the same after the prosecution had closed their case. On the 26th July witnesses Nos. 6 and 8 to 11 were recalled and examined by the prosecution, and, on the 1st August, one witness for the prosecution was examined. On that date the Magistrate passed the following order: "I exercise my discretion under section 347 of the Criminal Procedure Code, and I disallow any cross-examination here. I shall commit this case to the Sessions on the next day of hearing."

It is contended before us on behalf of the accused that the Magistrate had no right to adopt the course which he did, and that, inasmuch as the application to cross-examine the prosecution witnesses was made before he had decided to commit, and before he had framed the charges, the accused were entitled as of right to cross-examine the witnesses called on behalf of the prosecution. We have been referred to the case of *Queen-Empress v. Sagal Samba Sajao* (1),

(1) (1893) I. L. R. 21 Cal. 642.

which states the right of the accused before a charge has been framed to cross-examine^e the witnesses called on behalf of the prosecution previous to commitment. We have also been referred to the case of *Phanindra Nath Mitra v. Emperor* (1), where it appears that the Magistrate had decided to commit before an application to cross-examine was made, and we have further been referred to the case of *Fazarali v. Mazharullah* (2), where it was held that, after a Magistrate had made up his mind to commit a case to the Court of Sessions but before the case for the prosecution closed, one witness for the prosecution yet remaining to be examined, the defence was entitled to cross-examine the prosecution witnesses. These cases, or some of them, have been referred to by the Magistrate in his explanation, but we think that it is clear from these cases that the Magistrate had no discretion in the matter, and that he was bound, under the circumstances of this case, and having regard to the fact that the application to cross-examine was made before the charge was framed and before the Magistrate had decided to commit the case to the Court of Sessions, to allow the accused to cross examine the prosecution witnesses.

In these circumstances, the Rule is made absolute, and the order of commitment to the Sessions, so far as the present petitioners are concerned, is set aside.

This order is made so far as the accused Nos. 3 and 4 who are applicants before us are concerned, and the matter will accordingly go back to the Magistrate in order that he may deal with it in accordance with the law.

E. H. M.

Rule absolute.

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