CRIMINAL REFERENCE.

Before Page and Mukerji JJ.

1926

Feb. 16.

SUBAL CHANDRA NAMADAS

v.

AHADULLA SHEIKH AND ANOTHER.*

Process—Magistrate's jurisdiction to issue process—Criminal Procedure Code (Act V of 1898 as amended by Act XVIII of 1923), ss. 190, 200, 202 and 203.

When A has been tried and acquitted, the expression of a desire by the trial Court that further criminal proceedings should not be taken in connection with the subject matter of the trial does not operate as a bar in law to the issue of process against B who was neither tried nor acquitted at A's trial.

Kokai Sardar v. *Meher Khan* (1), *Manindra Chandra Ghose* v *Emperor* (2) and *Emperor* v. *Ghure* (3) referred to.

Bishun Das Ghosh v. *The King-Emperor* (4) and *Kedar Nath Biswas* v. *Adhin Manji* (5) considered and distinguished.

Where A and B are alleged to be concerned jointly in committing an offence, and A is tried and acquitted, and in the order of acquittal the trial Judge states that in his opinion the case for the prosecution is false :—

Held, that, although in such a case the plea of *autrefois acquit* would not be available to B, the fact that another person accused upon the same facts of having been implicated in the same offence has been acquitted might properly be taken into consideration by the Magistrate in determining whether upon the materials before him there was "sufficient ground for proceeding" to issue process upon the person against whom the complaint had been preferred.

In each case the Magistrate in deciding whether process should issue must exercise a judicial discretion having regard to the materials duly placed before him.

* Criminal Reference No. 1 of 1926 by G. C. Sankey, Sessions Judge of Mymensingh, dated Dec. 23, 1925 (Undefended).

(1) (1910) I. L. R. 37 Calc. 680. (3) (1914) I. L. R. 36 All. 168.
(2) (1914) I. L. R. 41 Calc. 754. (4) (1902) 7 C. W. N. 493.
(5) (1903) 7 C. W. N. 711.

Rooke's case (1) and *Sharp* v. *Wakefield* (2) referred to.

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This was a reference to the Hon'ble High Court under section 438 of the Code of Criminal Procedure by Mr. Sankey, the Sessions Judge of Mymensingh.

Two persons named Mukram Pramanik and Ibrahim Khan, from amongst several persons mentioned in the petition of complaint, were placed on their trial before a second class Magistrate of Tangail under section 426 of the Indian Penal Code for causing mischief to the crops of the complainant. These persons were duly tried and acquitted by the Magistrate. A few days later the complainant filed another petition of complaint on the same facts before a first class Magistrate of Tangail against other persons omitting the names of the two persons who had been acquitted. The Magistrate summoned two of such other persons under section 426. Upon that the accused moved the learned Sessions Judge, who was of opinion that so long as the acquittal of the two persons who had already been tried upon the same charge and on the same facts stood the Magistrate's order to issue process against the two persons was illegal, and, therefore, he referred the case to the High Court to quash the proceedings against the accused.

No one appeared on this Reference.

PAGE J. This case raises a question of importance relating to the jurisdiction of a Magistrate to issue process in a criminal case.

In the Code of Criminal Procedure (Act V of 1898 as amended) it is provided :—

Section 202 (1).—"Any Magistrate, on receipt of a complaint of "an offence of which he is authorised to take cognizance, or which has "been transferred to him under section 192, may, if he thinks fit, for "reasons to be recorded in writing, postpone the issue of process for

(1) (1598) 5 Co. Rep. 99b, 100a. (2) [1891] A. C. 173, 179.

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"compelling the attendance of the person complained against, and either "inquire into the case himself or, if he is a Magistrate other than a "Magistrate of the third class, direct an inquiry or investigation to "be made by any Magistrate subordinate to him, or by a police officer, "or by such other person as he thinks fit, for the purpose of ascertaining "the truth or falsehood of the complaint :

"Provided that no such direction shall be made—

"(*a*) unless the complainant has been examined on oath under the "provisions of section 200, or

"(*b*) where the complaint has been made by a Court under the "provisions of this Code."

Section 203.—"The Magistrate before whom a complaint is made or to "whom it has been transferred, may dismiss the complaint, if, after "considering the statement on oath (if any) of the complainant and "the result of any investigation or enquiry under section 202, there is in his "judgment no sufficient ground for proceeding. In such case he shall "briefly record his reasons for so doing."

On the other hand, if the Magistrate is of opinion that "there is sufficient ground for proceeding" it is his duty to issue process on the person or persons against whom the complaint has been preferred; sections 190 and 204.

The material facts are as follows :—

On the 5th March 1925, one Subal Chandra Namadas laid a complaint in writing before a Magistrate at Tangail that three named persons "and about 20 others" had allowed their cattle to graze on *kalai* growing in a field in the complainant's possession, and also had taken away some *kalai* from the field. Upon this complaint Mukram Pramanik and Ibrahim Khan, two of the three persons whose names were mentioned in the complaint, were duly tried by a second class Magistrate at Tangail under section 426 of the Indian Penal Code, and on the 2nd September 1925 were acquitted. Subsequently, on the 10th September 1925, the complainant preferred another complaint in writing before a first class Magistrate at Tangail against the petitioner Rostam Ahadulla Kalimuddi and others, 23 in all, "that they had

"let loose 48 cattle on the complainant's field and "caused a loss of Rs. 30. I filed case against two "accused but they have been acquitted." The Magistrate upon this complaint issued a summons to Ahadulla and another person to answer a charge under section 426, Indian Penal Code. The Sessions Judge of Mymensingh being of opinion that the Magistrate had no jurisdiction to issue process upon the petitioners so long as the acquittal of the persons who already had been tried upon the same charge and on the same facts stood good, has referred the matter to the High Court under section 438 of the Criminal Procedure Code. The question to be determined is whether the Magistrate was justified in law in issuing process upon the petitioners.

Now, under the Criminal Procedure Code a wide discretion is given to Magistrates with respect to the grant or refusal of process, and in the interest of the community generally it is essential that Magistrates should be vested with an ample discretion in respect of the issue of process. Except as otherwise provided by statute anybody is entitled to prefer a complaint in a criminal Court, and in India, where the Grand Jury system does not exist as an additional shield to innocent persons against whom unfounded complaints are laid in a Criminal Court, it is specially necessary, as is well stated in the Oudh Criminal Digest (page 7), that "caution and discretion should be used in "issuing summonses. An accused person ought not to "be dragged off to answer a charge merely because a "complaint has been lodged against him." But in this matter a Magistrate's discretion, though wide, is not unfettered. In memorable words the late Lord Halsbury laid down the course which a Magistrate ought to follow in exercising the discretion with which he is entrusted.

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"An extensive power is confided to the justices in their capacity as "justices to be exercised judicially; and 'discretion' means, when it is said "that something is to be done within the discretion of the authorities, that "that something is to be done according to the rules of reason and justice, "not according to private opinion; *Rooke's case* (1), according to law and "not humour. It is to be, not arbitrary, vague and fanciful, but legal and "regular. And it must be exercised within the limit to which an honest "man competent to the discharge of his office ought to confine himself." *Sharp* v. *Wakefield* (2).

Thus, in determining whether process ought to issue a Magistrate must proceed according to the provisions of the Code, and if, after carrying out the instructions therein contained, he is of opinion upon the materials before him that a *primâ facie* case has been made out he ought to issue process; and in such circumstances he is not entitled to refuse to issue process merely because he thinks that it is unlikely that the proceedings will result in a conviction. If the Magistrate were to refuse to grant a summons on that ground, it would mean either that he was trying out the merits of the case at a preliminary stage in the proceedings, or was following a process of guess work and speculation; and neither of these things is he permitted to do. If upon the facts alleged by the complainant, and upon the assumption that the statement by the complainant is true, no offence is disclosed, it is, of course, the duty of the Magistrate to dismiss the complaint. Again, if the Magistrate would not be justified in issuing process unless he could place reliance upon the statement which the complainant has made under section 200—and this is the ordinary case—then, if he distrusts the statement made by the complainant, or if he distrusts the complainant's statement, and the distrust—though not sufficiently strong to warrant him in acting upon it without

(1) (1598) 5 Co Rep. 99b, 100a. (2) [1891] A. C. 173, 179.

further enquiry—is confirmed as the result of an inquiry or investigation under section 202, in either case also it is his duty to dismiss the complaint: *Baidya Nath Singh* v. *Muspratt* (1). On the other hand, if the Magistrate were to come to the conclusion that the facts alleged by the complainant disclose an offence, and in his opinion there is no ground for distrusting the complainant, could it be contended in reason or equity that the Magistrate was not justified in issuing a summons merely because some other persons had been tried and acquitted upon the same charge and the same facts? Surely not; for *inter alia* it may be that at the previous trial the Magistrate had not correctly appraised the value of the evidence, or for some other reason the order of acquittal cannot be supported: *Kokai Sardar* v. *Meher Khan* (2), *Emperor* v. *Ghure* (3). It is unnecessary in this case to consider the interesting and difficult question as to whether, and if so in what circumstances, a Magistrate is entitled to take into account the *bonâ fides* of the complainant in considering whether there is "sufficient ground" for issuing process, and I refrain from doing so. It is settled practice, however, that if the Magistrate, having followed the procedure laid down in the Code, has exercised a judicial discretion as to whether he ought to issue process or not, the High Court will respect his decision, and will be slow to disturb the order that he has passed. The learned Sessions Judge in his report on this case has expressed the opinion that the Magistrate had no jurisdiction to issue process against the petitioner so long as the acquittal of the persons accused of being participators in the same offence stands good. I am of opinion that this view is unsound and cannot be sustained. In support of his opinion the

(1) (1886) I. L. R. 14 Calc. 141. (2) (1910) I. L. R. 37 Calc. 680.
(3) (1914) I. L. R. 36 All. 168.

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learned Sessions Judge cited *Panchu Singh* v. *Omor-Mahomed Sheikh* (1), *Bishun Das Ghosh* v. *The King-Emperor* (2), and *In re Azim Sheikh* (3). The report of *Panchu Singh's* case (1), however, is not satisfactory, and it is not clear whether process was issued against both the accused, or whether it was intended that the charges should be dismissed against both of them. *In re Azim Sheikh's* case (3) is against the view which the learned Sessions Judge recommends to this Court. In that case one Bachanuddi preferred a complaint against Maghu and Azim for having trespassed upon his land. Process was issued against Maghu, who was tried and acquitted. Subsequently a summons was issued against Azim upon the same charge, and the order directing the issue of the summons upon Azim was referred to the High Court with a recommendation that it should be set aside on the ground that the Magistrate had no jurisdiction to pass such an order. The reference was rejected, and Mukerji J. distinguished *Panchu Singh's* case (1) on the ground that "in that case the Magistrate's order "was construed as indicating a desire to terminate all "proceedings relating to the matter in his Court, and it "was held that the District Magistrate could not interfere under section 437". I confess that I am unable from the report to ascertain the facts upon which *Panchu Singh's* case (1) was decided, or the ground of the decision. I cannot, therefore, regard it as an authority. It appears to me, however, that when A has been tried and acquitted, the expression of a desire by the trial Judge that further criminal proceedings should not be taken in connection with the subject-matter of the trial cannot operate as a bar in law to the issue of process against B who was neither tried nor

(1) (1899) 4 C. W. N. 346. (2) (1902) 7 C. W. N. 493.
(3) (1907) 7 C. L. J. 249.

acquitted at A's trial. *Bishun Das Ghosh's* case (1) and *Kedar Nath Biswas* v. *Adhin Manji* (2), were cases in which the accused were charged with various offences, including the offence of unlawful assembly in which it was necessary that at least five persons should jointly be implicated. After the trial and acquittal of some of the accused there was obviously no "sufficient ground" in the circumstances for proceeding afterwards against the petitioners: see *Kokai Sardar's* case (3). It is further urged that where A and B are alleged to be concerned jointly in committing an offence, and A is tried and acquitted, and in the order of acquittal the Magistrate states that in his opinion the prosecution case is false, such an order ousts the jurisdiction of a Magistrate subsequently to issue process against B in respect of the said offence until the acquittal of A has been set aside: see *Bishun Das Ghosh's* case (1), and *Kedar Nath's* case (2). Those cases are distinguishable from the present case on the facts, for the learned Magistrate in the present case found "that the case seems to be purely a land "dispute of civil nature, with a long history having "equilibrium for each side". But, in my opinion, the above proposition regarded as a statement of law, with all due deference to the learned Judges who laid it down, is not only unsound in principle, but is opposed to the decisions of this Court in *Kokai Sardar's* case (3), *Manindra Chandra Ghose* v. *Emperor* (4); see also *Emperor* v. *Ghure* (5). The true view appears to be that although in such a case the plea of *autrefois acquit* would not be available to B, and the acquittal of A would not bar the issue of process against B, the fact that another person accused upon the same facts of

(1) (1902) 7 C. W. N. 493.
(2) (1903) 7 C. W. N. 711.
(3) (1910) I. L. R. 37 Calc. 680.
(4) (1914) I. L. R. 41 Calc. 754.
(5) (1914) I. L. R. 36 All. 168.

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having been implicated in the same offence has been acquitted may properly be taken into consideration by the Magistrate in determining whether upon the materials before him there is "sufficient ground for proceeding" to issue process upon the person against whom the complaint has been preferred. In each case the Magistrate in deciding whether process should issue must exercise a judicial discretion having regard to the materials duly placed before him. In the present case the learned Magistrate, having come to the correct conclusion that the acquittal in the previous trial was not a bar to the issue of process against the petitioners, appears straightway to have ordered that process should issue without paying any regard to what had taken place in the earlier proceedings. That, we think, he ought not to have done. Accordingly, we set aside the order that process should issue against the petitioners, and in the circumstances we are of opinion that no further proceedings should be taken against the petitioners.

MUKERJI J. I have read the judgment of my learned brother in this case, and I agree in the observations he has made, the conclusions he has arrived at and the order he has passed.

B. M. S.