APPELLATE CRIMINAL.

Before Panckridge and M. C. Ghose JJ.

SHYAMDAS KAPUR

v.

EMPEROR*.

1932

March 11 ; *July* 13.

Inspection—Document, if can be called for inspection—Indian Evidence Act (I of 1872), s. 164.

Section 164 of the Indian Evidence Act does not contemplate the production of a document for inspection. It contemplates that one party should call upon another in court to produce a document of which the first party has given the other notice to produce. It does not give him any right, at any stage of the case, to call upon his opponent to produce the document and, after inspecting it, use it or not as he sees fit.

It is doubtful if section 164 of the Indian Evidence Act applies to criminal proceedings.

CRIMINAL APPEAL.

The material facts and arguments appear from the judgment of the Court.

Heeralal Ganguli for the appellant.

Anilchandra Ray Chaudhuri for the Crown.

PANCKRIDGE J. In this case, the accused has been convicted of an offence punishable under section 408 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for six weeks and to pay a fine of Rs. 1,000 and, in default, to undergo further imprisonment for six months. The learned magistrate further ordered that the whole of the money, if realised, should be paid to the complainant as compensation.

The case for the prosecution is that the accused was a servant of the complainant and was left in charge of a business belonging to the complainant in

*Criminal Appeal, No. 818 of 1931, against the order of H. K. De, Fourth Presidency Magistrate, Calcutta, dated Oct. 9, 1931.

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Calcutta, known as the Punjab Watch Company. The complainant fell ill and went to Amritsar, of which place he is a resident. On his return, he found that the accused had removed all the stock in trade of the shop and converted it to his own use. The defence suggested by the accused was that he was not a servant of the complainant, but a partner in this business, called the Punjab Watch Company. The complainant gave evidence that the accused was his servant and in this he was corroborated by a man named Kissen Chand, prosecution witness No. 8. If Kissen Chand is believed, it is very difficult to see how the accused can have any answer to the charge. After the complainant had discovered what had happened he made enquiries and he eventually had the accused arrested by the police at Moradabad. In the possession of the accused, when he was arrested, were found two books of account. These books were seized by the police, but were afterwards returned to the accused, on his giving security for their production. The next step taken by the accused was that he filed a suit in the Amritsar court for dissolution of partnership, in which he made the complainant a defendant and asked for taking the accounts of the Punjab Watch Company. I will assume that this case is defended and that the complainant denies the fact of partnership alleged by the accused. In the course of the proceedings before the learned Chief Presidency Magistrate, it appears from the order sheet that the complainant from time to time called for the production of the two books, to which we have referred. The accused did not produce the books and he gave excuses for their non-production, which appear to me to be extremely flimsy. It may be that his security has been forfeited by his conduct. But that depends on the terms of the security bond and we express no opinion with regard to that. Among other attempts to get the production of the documents on the part of the complainant is a petition filed by him on the 24th of June, 1931, in which he asked that a notice

should be given to the accused for the production of the books in court for inspection. As I have said, the accused never did produce these books for inspection, his failure to do so appears to the learned magistrate, to be a ground to deprive him of the right to use these documents as material for his defence. The learned magistrate based this view on section 164 of the Indian Evidence Act, which provides that, when a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the court. Accordingly, when, in cross-examination, the complainant was shown these books, he refused to have anything to do with them or to answer any question with regard to them and, in his refusal, it is clear that he was supported by the learned magistrate. In my opinion, the learned magistrate misunderstood the meaning and intention of section 164. Speaking for myself, I am by no means convinced that section 164 applies to criminal proceedings. Section 164 does not contemplate the production of documents for inspection. What it contemplates is that one party should call upon another in court to produce a document, of which the first party has given the other notice to produce. It does not give him any right, at any stage of the case, to call upon his opponent to produce the document and, after inspecting it, use it or not as he sees fit. I do not myself see any indication in the section that the complainant can call for a document in this sense. We think that the learned magistrate was wrong in not permitting the pleader for the defence to put these documents to the complainant and cross-examine him on them. The fact that the accused adopted an unreasonable attitude with regard to their production may be material when the time comes to consider what weight is to be attached to them. This seems to us to be a sufficient reason for setting aside the conviction. At the same time, we consider that

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a very strong *prima facie* case has been made out by the evidence of the complainant and the witness Kissen Chand, and we do not think that we should be justified in directing that the accused be acquitted.

We therefore, set aside the order of conviction. But the appeal will remain pending for a period of three months. During that time, if the accused so desires, he can take reasonable steps to have the question decided in the Amritsar court. The case will be laid before us again after the interval of three months for considering whether we should order a retrial or pass some other order.

GHOSE J. I agree.

July 13.

PANCKRIDGE J. It now appears that on the 11th March last when we dealt with the matter, the civil suit instituted by the appellant in Amritsar had already been dismissed in default of appearance. In these circumstances, we consider that the proper order to make is one for retrial of the accused by some magistrate other than the magistrate who convicted him of the offence punishable under section 408 of the Indian Penal Code. The learned magistrate who tries the case will take note of our observations as to the right of the appellant to cross-examine the complainant on the books of account.

The accused will continue on the same bail.

GHOSE J. I agree.

Appeal allowed. Retrial ordered.

A. C. R. C.