## CRIMINAL REVISION.

*Before C. C. Ghose, Suhrawardy and Graham JJ.*

# BHUTNATH GHOSH

*v.*

# THE EMPEROR.*

1929

*May* 3.

*Notice—"Substance of information," meaning of—Notice under s. 112, Cr. P. C., what it should contain—Omission in notice, if curable by s. 537, Cr. P. C.—Cross-examination, if there is a right to reserve—Presumption of prejudice, if arises when a right is denied—Code of Criminal Procedure (Act V of 1898), ss. 112, 537.*

*Per Curiam.* "Substance of the information" in section 112 of the Code of Criminal Procedure means substance as distinguished from details or particulars and a notice under that section should contain so much of the information as would enable the party to know under what clause of section 110 he is charged or to what particular class of offenders he is said to belong. It was never contemplated that the proceeding should set out details in the manner of a charge drawn up at a trial.

Any omission in the notice is at the most an irregularity under section 537 and should not vitiate the entire proceedings without proof of prejudice to the accused.

*K. Ranga Reddi* v. *King-Emperor* (1) and *Emperor* v. *Nihal* (2) dissented from.

*Chintamon Singh* v. *Emperor* (3), *Rajendranarain Singh* v. *Emperor* (4) and *Queen-Empress* v. *Ishwar Chandra Sur* (5) followed.

*Per* SUHRAWARDY J. Proceedings under Chapter VIII should not be carried on in such a way as to hamper the offender in his defence and place him in a worse position than if he were accused of a substantive offence. Before he defends himself he must know definitely the case he has been called upon to meet. This may be done either by giving him sufficient information of the evidence to be called or allowing him to reserve cross-examination till he has full information about the case against him. A refusal to grant either of the two prayers prejudices the party concerned.

When a right is conferred by law on a party, it may be presumed to be for his benefit; if such right is denied him, it may also be presumed that he has been deprived of that benefit.

CRIMINAL RULE on behalf of the accused.

A report was received from the officer in charge of Chandrakona *thana* in district Midnapur against

*Criminal Revision, No. 1249 of 1928, against the order of S. M. Masih, Additional Sessions Judge of Midnapur, dated Sept. 29, 1928, confirming the order of P. C. Sen, Subdivisional Magistrate, Ghatal, dated July 31, 1928.

(1) (1919) I. L. R. 43 Mad. 450.
(2) (1926) I. L. R. 49 All. 5.
(3) (1907) I. L. R. 35 Calc. 243.
(4) (1912) 17 C. W. N. 238.
(5) (1884) I. L. R. 11 Calc. 13.

1929

BHUTNATH GHOSH v. THE EMPEROR.

Bhutnath Ghosh, on the 27th February, 1928, alleging that the man was a thief and burglar by habit and that he was of a desperate and dangerous character. Proceedings were drawn up against him under section 110, Criminal Procedure Code, under clauses (*a*) and (*f*), and explained and read over to him on the 7th March, 1928. There were 84 prosecution witnesses including police officers and 28 defence witnesses.

The accused contended in his defence that he had been handicapped, as the charges against him had not been enumerated in the proceedings and he had no knowledge of the allegations against him.

The Subdivisional Magistrate, Ghatal, by his order, dated 3rd July, 1928, bound down Bhutnath Ghosh under section 110 (*a*), Criminal Procedure Code, read with section 118 of that Code, and directed him to execute a bond of Rs. 300 to be of good behaviour for a period of one year and to find two sureties of his good behaviour of Rs. 150 each for the same period, in default to undergo rigorous imprisonment for one year.

The appeal by the accused to the Additional Sessions Judge of Midnapur was dismissed on the 29th September, 1928.

The accused then moved the High Court and obtained this Rule.

The Rule was heard by Suhrawardy and Graham JJ., who differed in opinion, and delivered the following dissentient judgments :—

SUHRAWARDY J. This is an open Rule for revising the order of the Subdivisional Officer of Ghatal under section 110(*a*), read with section 118, of the Code of Criminal Procedure, confirmed by the Additional Sessions Judge of Midnapur. Two points, which have been stressed before us and require consideration, are, first, that the proceeding, drawn up under section 112 of the Criminal Procedure Code, is illegal and secondly, that the learned Judge has misread the evidence of some of the prosecution witnesses, when he says that they deposed to the fact of having direct knowledge of the petitioner committing theft.

As regards the first point, it is urged that the notice under section 112 of the Code of Criminal Procedure was vague, inasmuch as it did not set forth the substance of the information received against the petitioner. Section 112 says that the magistrate shall make an order in writing, setting forth

the substance of the information. The proceeding drawn up by the Magistrate, a copy of which was served on the petitioner, was in these words: "Whereas it appears from the report, dated the 28th February, 1928, "submitted by the Sub-Inspector of police-station Chandrakona that Bhut-"nath Ghosh, son of *etc.*, within the local limits of my jurisdiction, is by "habit a thief, a robber and house-breaker and is so desperate and dangerous "as to render his being at large without security hazardous to the commu-"nity, *etc.*" It may be incidentally noted that the petitioner was found not guilty of the charge of being a desperate and dangerous character; he has been bound down only under section 110 (*a*) for being by habit a thief, robber and house-breaker. It is argued that the notice served upon the petitioner merely repeated the words of the section and did not give the substance of the information upon which the magistrate acted as required by section 112. It is contended, on the authority of *K. Ranga Reddi* v. *King-Emperor* (1) and *Emperor* v. *Nihal* (2), that the notice was insufficient and vague, as it merely quoted the words of the section and did not mention the particulars of the information received by the magistrate. With great respect to the learned Judges who decided those cases, I am unable to agree with the interpretation there put on the words "su' stance o ' the information " in section 112. The learned Judges require that the notice should contain such details of information as to enable the accused to know in what cases he has been suspected and the names of the witnesses to prove the charges against him. This, to my mind, is not "substance of the information ", but details of information, which may, in some cases, be not only very inconvenient, but almost impracticable to put in the notice. A person may be suspected in a hundred cases and there may be 5 hundred witnesses to prove such suspicion and general repute. It is not reasonable to suppose that the law intended that all this information should be conveyed in the notice. If the notice states that the accused has been suspected in a hundred cases and there are five hundred witnesses to support the charge against him, it will not be of any practical help to him. There may be cases, in which the substance of the information should be briefly conveyed to him, if feasible, as, probably, under section 107, but ordinarily it cannot be insisted that any detailed information, however shortly it may be conveyed, should be supplied by the notice. In my opinion, the words "substance of the information " mean such or so much of the information as would enable the party to know, under what clause of section 110, he is charged or to what particular class of offenders he is said to belong. For instance, in this particular case he is said to be by habit a robber, house-breaker and thief, but not a forger. Under clause (*d*) of section 110, he may, by habit be an abettor of the commission of the offences of kidnapping, abduction, *etc.* The notice should specify as to which offence or offences, mentioned in the clause, he is said to be, by habit, an abettor. I concede that, where possible, the repetition of the words of the section should be avoided, but it may not be possible in every case. We have authorities of this Court in support of this view. In *Chintamon Singh* v. *Emperor* (3), the notice was in similar words as in the section. It was held that the notice was good, though it did not contain more information than that the accused was of a dangerous and desperate character. Similar objection was taken in *Rajendranarain Singh* v. *Emperor* (4). It is observed at page 261 " the Magistrate is further not bound to reveal the source of his "information; it is sufficient if he states the substance thereof and the Crown "is not bound at the initial stage even to name the witnesses." This section is intended to meet such a case as arose in *Queen-Empress* v. *Ishwar Chandra Sur* (5), where the notice did not mention under what clause of which section

(1) (1919) I. L. R. 43 Mad. 450.
(2) (1926) I. L. R. 49 All. 5.
(3) (1907) I. L. R. 35 Calc. 243.
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1929

BHUTNATH GHOSH v. THE EMPEROR.

SUHRAWARDY J.

the accused was called upon to defend himself under Chapter VIII. Even if it be held that it was necessary to give more information in the notice, the omission at the most is an irregularity under section 537 and should not vitiate the entire proceedings without proof of prejudice to the accused. I do not agree with the learned Judges of the Madras High Court that it is an illegality.

Though I hold that the law is satisfied if the notice contains the gist of the information and not a reference to cases and witnesses, proceedings under Chapter VIII should not be carried on in such a way as to hamper the offender in his defence and place him in a worse position than if he were accused of a substantive offence. Before he defends himself by cross-examining the witnesses for the prosecution and examining his own, he must know definitely the case that he has been called upon to meet. When the accused appears and prays for information about the evidence which the Crown proposes to adduce against him, it should be supplied or so much of it as is practicable. This may be done in two ways. He may be given sufficient information of the evidence to be called or he may be allowed to reserve cross-examination till he has full information about the case against him. Now in this case, as the petitioner alleges in his petition, he asked from the prosecution information about the witnesses intended to be examined, but it was refused. He then asked for permission to reserve cross-examination of witnesses, as he had the right to do, but that too was refused. As soon as a witness was placed in the box and examined, he was asked to cross-examine him without knowing the whole case for the Crown and without having time to collect materials for the cross-examination of the witness and giving proper instructions to his lawyer. One need hardly refer to the inconvenience and practical inutility of instructing the cross-examining pleader from the dock. As the procedure to be followed in the case was to be that prescribed for trial of warrant cases, it was improper to call upon the petitioner to cross-examine the witnesses then and there, who were immediately discharged. The trying magistrate submits in his explanation that the petitioner could have applied for recalling the witnesses under section 256, Criminal Procedure Code, and, not having done so, he cannot now complain of prejudice. I am not impressed by this argument, for the petitioner's prayer for reserving cross-examination having been refused he had no hope that his prayer for recalling witnesses would have been granted. Besides, as has been held by the Additional Sessions Judge, it seems to be the opinion of the courts below that section 256 is not applicable to proceedings under section 110, for reasons not discussed, but apparently, as no charge is to be framed. In view of the procedure adopted by the trial magistrate, I cannot say that the petitioner was not prejudiced in his defence. When a right is conferred by law on a party, it may be presumed that it is for his benefit; if such right is denied him, it may also be presumed that he has been deprived of that benefit. It is not such a clear case in which I can honestly say that the evidence for the prosecution is so overwhelming that it will be futile to order a retrial. The defence examined 28 witnesses, one of whom was the local *zemindar*, pleader and Chairman of the Midnapur District Board. Of all the witnesses examined for or against, he is the most respectable and his evidence supports the defence case. Though the learned Judge has attemped to explain away his evidence by observing that he does not ordinarily live in the village, but the fact is that he is the local *zemindar* and often visits the village, which is within a few miles of the town of Midnapur. It is hard to suppose that if the petitioner bears the character and the repute, which he is said to do, the witness would have been ignorant of it. I do not mean to suggest that, on the evidence as it stands on the record, the petitioner is entitled to an acquittal, but I hold that the petitioner has made out a case that he has been prejudiced by the procedure adopted and that it is a proper case for our

interference. I would, therefore, make the Rule absolute, set aside the order complained against him and direct that the petitioner be retried according to law.

As to the second ground, I do not think there is much substance in it. By saying that some of the witnesses have direct knowledge of the petitioner's committing theft, the learned Judge means to distinguish those witnesses from others who have given evidence of general repute. Though the word "knowledge" is not happily used, the witnesses have spoken to facts which led them to believe that the petitioner is a thief.

GRAHAM J. I have the misfortune to differ from my learned brother, the conclusion at which I have arrived being that the Rule should be discharged.

The main point urged before us is that the proceeding drawn up under section 112 of the Criminal Procedure Code is defective and contrary to law, inasmuch as it does not embody the necessary materials required by that section. The section enacts that when a magistrate, acting under section 110, Criminal Procedure Code, deems it necessary to require any person to show cause, he shall make an order in writing, setting forth—

(1) the substance of the information received;

(2) the amount of the bond to be executed;

(3) the term for which it is to be in force, and

(4) the number, character, and class of the surety required.

The order in question contains all these matters. It has been argued that it is not a compliance with the sections to merely set forth the substance of the police report in terms of the language of section 110, that the accused is by habit a thief, robber, and house-breaker, and that something more is required, *viz.*; particulars of the charge, giving details of the cases, in connection with which the accused was charged or suspected on the previous occasions. In my opinion, this contention is not well founded. The question is what is meant by "substance of the information." As I understand the words, it means substance as distinguished from details or particulars, and I do not think that it was ever contemplated that the proceeding should set out details in the manner of a charge drawn up at a trial. The distinction between an inquiry of this nature and a trial should be borne in mind. I do not remember, in my experience, to have seen a proceeding in which particulars were set forth in the manner demanded by the petitioners.

The learned advocate for the petitioners has referred to *Rajbansi* v. *Emperor* (1) and *K. Ranga Reddi* v. *King-Emperor* (2) in support of his contention, but with all respect for the learned Judges who were responsible for them, I am not prepared to follow those decisions. The learned advocate was unable to show any authority of this Court in favour of his proposition; on the other hand, I find that there is the case of *Chintamon Singh* v. *Emperor* (3), which supports the view I have taken.

It was next urged that the learned Additional Sessions Judge misread the evidence of prosecution witnesses Nos. 1, 5, 6, 7, 11, 13, 16, 18, 20, 21, 22, 23, 24, 35, 44, 46, 48, 61, 63, 71, 74 and 75, inasmuch as they did not state that they had direct knowledge of the petitioner, Bhutnath, committing theft as stated in his judgment. The evidence of these witnesses has been referred to, and it is clear that, so far as some of these witnesses are concerned, the remark made by the learned Judge is incorrect. But the order ought not, on that account, to be set aside, if it is clear that the materials on record are sufficient to justify the order for security. As to that, it appears

(1) (1920) 18 A. L. J. 673. (2) (1919) I. L. R. 43 Mad. 450.
(3) (1907) I. L. R. 35 Calc. 243.

1929

BHUTNATH GHOSH v. THE EMPEROR.

GRAHAM J.

to me that there is ample evidence. Some of these witnesses have given direct evidence of theft against the petitioner, and there is, apart from that, a considerable body of evidence of repute. On the merits, the main question was whether the petitioner was the bad character he was represented by the prosecution to be, or whether it was a case of a village conspiracy to drive away an innocent person, who had made himself unpopular and obnoxious to the people of the village. The question of fact was one for the magistrate to decide, and, in my judgment, there is sufficient evidence to support his decision. I would, therefore, discharge the Rule.

The case was then referred to Mr. Justice C. C. Ghose.

*Mr. Satkarhipati Ray* and *Mr. Beereshwar Chatterji*, for the petitioner.

*No one* appeared for the opposite party.

GHOSE J.

C. C. GHOSE J. I have had an opportunity of examining the entire record and of perusing the two judgments of the learned Judges who have differed in this matter. I am in agreement with Mr. Justice Suhrawardy in the view expressed by him and, for the reasons given by him, I am of opinion that the ends of justice require that the order complained of should be set aside and the case sent back for re-trial on the lines indicated by Mr. Justice Suhrawardy.

*Rule absolute. Retrial ordered.*

S. R.